

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 26, 2008

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Oahu

Forfeiture of General Lease No. S-4008, Walter and Evelyn Chong Trust, Lessees,  
Waimanalo, Koolaulopoko, Oahu, Tax Map Key:(1) 4-1-027:014.

BACKGROUND:

The above subject matter was presented to the Board at its meeting of June 13, 2008, agenda item D-7. The Land Board "[a]mended staff's recommendation by deferring the effective date of this Board action for 30 days until July 13, 2008 to provide the parties the opportunity to return to the Board with recommendations, if any, for addressing the Lessee's concerns about the arbitration process. Otherwise, the Land Board approved staff's recommendations authorizing the cancellation of General Lease No. 4008. Attorney for Lessees, Robert Chong orally requested a contested case hearing on the Board's decision and was informed by the Chair that he had 10 days to file a written request." A copy of the submittal and minutes are attached as Exhibit A & B respectively.

A written petition for a contested case hearing was filed by the lessees on June 20, 2008. On August 7, 2008, we received a letter from the Department of the Attorney General (AG) which concluded that the lessees are not entitled to a contested case hearing.

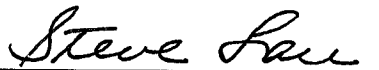
On July 10, 2008, the lessees paid \$4,680.00, which represented the balance of delinquent rent owed by the lessees. Further, the Department received another payment of \$1,655.00 on September 9, 2008.

As mentioned above, the only matter pending prior to termination was the 30-day delay to provide the parties the opportunity to return to the Board with recommendations, if any, regarding the Lessee's concerns about the arbitration process. Staff received no request for any meeting or discussion regarding the appeal to the arbitration award from the lessees. In authorizing the termination of the lease, the Board did not provide lessee any right or opportunity to cure the defaults under the lease.

RECOMMENDATION: That the Board:


1. Confirm its authorization to the cancellation of General Lease No. S-4008; and terminate all rights of Lessee and all obligations of the Lessor effective as of July 13, 2008, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law;
2. Authorize the retention of all sums heretofore paid or pledged under General Lease No. S-4008 to be applied to any past due amounts;
3. Authorize the refund of any overpaid rent for the period after the effective date of the termination; and
4. Authorize the Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under General Lease No. S-4008 and to pursue all other rights and remedies as appropriate.

Respectfully Submitted,



Steve Lau  
Land Agent

APPROVED FOR SUBMITTAL:

  
Laura H. Thielen, Chairperson

644008 2-1

**AMENDED**

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

June 13, 2008

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Oahu

Forfeiture of General Lease No. S-4008, Walter and Evelyn  
Chong Trust, Lessees, Waimanalo, Koolaupoko, Oahu,  
Tax Map Key: (1) 4-1-027:014.

PURPOSE:

Forfeiture of General Lease No. S-4008, Walter and Evelyn Chong  
Trust, Lessees.

LEGAL REFERENCE:

Section 171-39, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Waimanalo Agriculture Subdivision  
situated at Waimanalo, Koolaupoko, Oahu, identified by Tax Map  
Key: (1) 4-1-027:014, as shown on the attached map labeled  
Exhibit A.

AREA:

20.395 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_\_\_\_\_ NO   X  

CHARACTER OF USE:

Diversified agriculture purposes.

TERM OF LEASE:

45 years, commencing on September 12, 1966 and expiring on  
September 11, 2011.

*as Amended*  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON *MB*

June 13, 2008

D-7

**EXHIBIT "A"**

ANNUAL RENTAL:

\$9,930 due quarterly.

REMARKS:

Pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources at its meeting of January 13, 1980 and the breach provision contained in General Lease S-4008, Walter and Evelyn Chong, Lessees, was served a Notice of Default by certified mail dated March 12, 2008 for:

X Failure to keep lease rental payments current

Said notice, accepted by the Lessee on March 14, 2008, offered the Lessee a sixty day cure period to correct the default. This cure period expired on May 14, 2008. At the time of writing this submittal, this breach has not been cured, and the current status of all lease compliance items is as follows:

RENT: The Lessee has a rental delinquency of \$4,822.50 for time period from December 11, 2007 to June 10, 2008.

INSURANCE: The Lessee has posted the required liability insurance policy.

PERFORMANCE BOND:

The Board at its meeting on February 10, 1995, under agenda item WVR-01, waived the bond requirement for General Lease No. S-4008.

CONSERVATION PLAN:

The Lessees has not submitted a conservation plan. Letter dated January 24, 2007 was sent to Lessees to work with NRCS to complete a conservation plan. Upon checking with NCRS, the Lessees have not made any effort to contact NCRS regarding a conservation plan.

Previously, Notice of Default letters dated June 30, 2006 and October 5, 2007 were issued to the Lessees for expired Liability Insurance policies and for delinquent rent in the amount of \$2,482.50 for the period from September 11, 2007 to December 10, 2007. This amount was paid by the Lessees on January 23, 2008.

A regular rental reopening for General Lease No. S-4008 was conducted in May 2006, which increased the annual rent amount from \$3,500 to \$11,300 for the period from September 11, 2006 to September 10, 2011.

The Lessees rejected the new lease rent of \$11,300 and decided to enter into an arbitration process. The Department submitted its Post-hearing submittal for the arbitration (Exhibit B).

An arbitration panel determined that the new rent should be \$9,930 per annum for the period September 11, 2006 through September 10, 2011. (Exhibit C)

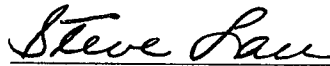
Mr. Walter Chong sent a letter to the Department dated October 30, 2007, stating that he disagreed with the arbitration panel's finding as well as the methodology of land appraisals. (Exhibit D)

On April 28, 2008, Land Division received a check in the amount of \$875.00, which represented a partial payment of the delinquent rent owed by Walter Chong, along with a copy of his letter dated October 30, 2007, stating his objection to the new lease rent for General Lease No. S-4008.

RECOMMENDATION: That the Board:

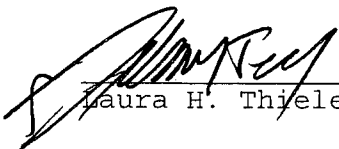
1. Authorize the cancellation of General Lease No. S-4008 in the manner specified by law;
2. Authorize the retention of all sums heretofore paid or pledged under General Lease No. S-4008 to be applied to any past due amounts;
3. Terminate the lease and all rights of Lessee and all obligations of the Lessor effective as of June 13, 2008, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law; and
4. Authorize the Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under General Lease No. S-4008 and to pursue all other rights and remedies as appropriate.

Respectfully Submitted,



Steve Lau  
Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson

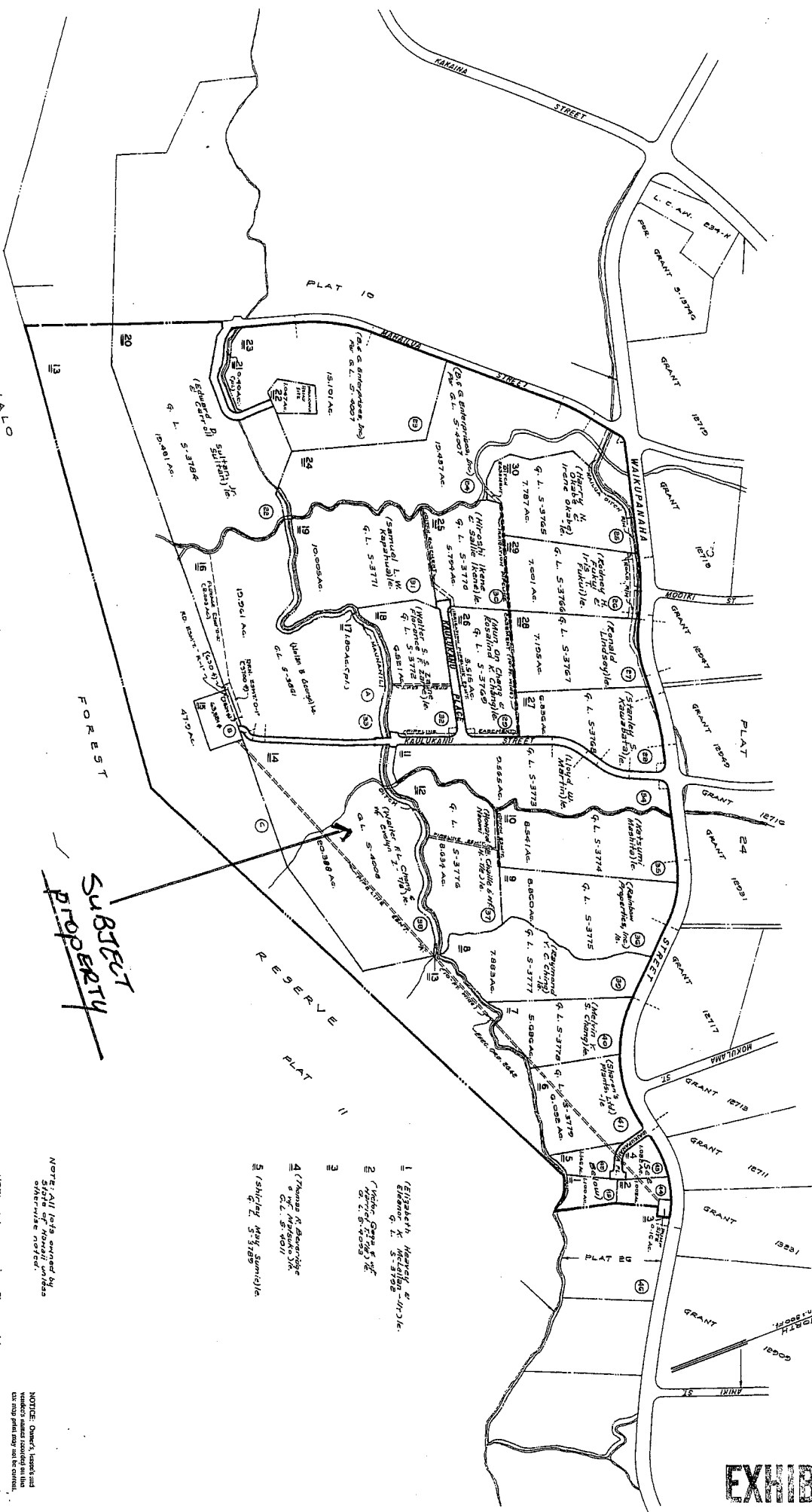


June 13, 2008, Item D-7

Forfeiture of General Lease No. S-4008, Walter and Evelyn Chong Trust, Lessees, Waimanalo, Koolaupoko, Oahu, TMK: (1) 4-1-027:014. (ODLO) (Steve L.)

**APPROVED AS AMENDED.** The Land Board amended the recommendation by deferring the effective date of this Board action for 30 days until July 13, 2008, to provide the parties the opportunity to return to the Board with recommendations, if any, for addressing the Lessee's concerns about the arbitration process. Otherwise, the Land Board approved staff's recommendations as submitted. Attorney for Lessees, Robert Chong orally requested a contested case hearing on the Board's decision and was informed by the Chair that he had 10 days to file a written request.

# EXHIBIT "A"



NOTE: All lots owned by  
S. J. O. S. 3704  
otherwise noted.

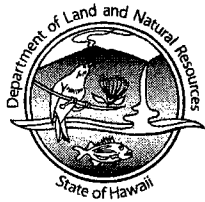
NOTE: All recording, filing, etc.,  
other elements, including the  
existing irrigation systems on  
the property, shall be under the  
control of the Waimanalo  
Water & Land Development  
Division.

DEPARTMENT OF TAXATION  
PROPERTY ASSESSMENT DIVISION  
TAX MAPS BRANCH  
TAX MAP

FOR REAL PROPERTY TAXATION PURPOSES  
SUBJECT TO CHANGE

4	1	27
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LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

February 20, 2007

Paul D. Cool, MAI, CRE  
John Child & Company  
841 Bishop Street, Penthouse  
Honolulu, Hawaii 96813

Jan R. Medusky, MAI, CRE  
Medusky & Co., Inc.  
800 Bethel Street, Suite 404  
Honolulu, Hawaii 96813

Mitsuo Shimizu, CGA  
1149 Bethel Street, Suite 217  
Honolulu, Hawaii 96813

Re: Ground Rent Arbitration for General Lease S-4008, Walter & Evelyn Z. Chong,  
Lessees, Waimanalo, Oahu, Hawaii

Messrs. Cool, Medusky, and Shimizu:

The State of Hawaii, Department of Land and Natural Resources, Land Division (the "*State*"), hereby submits its Post-hearing Submittal pursuant to the Statement of Procedures, Scheduling and Fees issued December 26, 2006. As set forth more fully below, the State contends that the fair market rental of the property should be \$11,300 per annum for the period September 11, 2006 through September 10, 2011.

I. Introduction

The matter before this arbitration panel (the "*Panel*") is a rent reopening proceeding pursuant to General Lease #S-4008, dated October 24, 1966, as amended (the "*Lease*"), for an agricultural property in Waimanalo, Oahu, Hawaii, containing approximately 20.388 acres (the "*lease area*"). As previously advised to the Panel, the Lease provides for the property to be used for general agriculture (Lease at §18) and importantly, allows for the Lessee to build and maintain a single family dwelling at the property along with additional employee housing as deemed necessary and with the consent of the Lessor (Assignment of General Lease No. S-4008 into Trust, March 10, 1992, Ex. A, p. 4). The

EXHIBIT "B"



State of Hawaii, by its Board of Land and Natural Resources, is grantor ("**DLNR**") and Walter F.L. and Evelyn Chong, Trustees ("**Chongs**" or "**the Lessees**") are the grantee under the General Lease. The rent reopening period at issue is from September 11, 2006 through September 10, 2011, at which time the General Lease will terminate.

One appraisal report and one Study for Rental Reopening have been prepared, each with a valuation or effective date of September 12, 2006, which should be more correctly stated to be with a valuation or effective date of September 11, 2006:

1. Summary Appraisal Report to determine prospective annual ground rent for the subject General Lease S-4008 (the Chongs), which was prepared by Panel Member Jan R. Medusky, MAI, CRE, with a report date of May 8, 2006 ("**Medusky Appraisal**")
2. Study for Rental Reopening to provide factual data and analysis in support of an independent value opinion related to the annual ground rent determination for the subject General Lease S-4008 (the Chongs), which was prepared by Panel Member Mitsuo Shimizu, with a report date of November 24, 2006 ("**Shimizu Report**")<sup>1</sup>

## **II. There is no conflict of interest for Jan R. Medusky ("Medusky")**

As required by HRS §658A-12(a), Mr. Medusky issued his Disclosure Statement to the parties on November 16, 2006. In that statement, it was disclosed that he had previously completed work for the Chongs "regarding the rent determination for the subject property approximately 10± years ago."

The Chongs contend that by virtue of the fact that Medusky served as an "appraiser consultant" for them during a past arbitration for the ten year period September 11, 1996 to September 10, 2006 (which arbitration actually occurred five years subsequent to the beginning of that period, during a several month process, including September, 2001), the Chongs have therefore served notice to the State "of Lessee's concerns over the appearance of a conflict of interest and concerns over the lack of a timely disclosure by Mr. Medusky."

HRS §658A-12(a)(2) requires disclosure of a past relationship of an arbitrator to a party. Also, HRS §658A-12(c) states that the disclosure and timely objection may be a ground for vacation of award under HRS §658A-23(a)(2). However, HRS §658A-23(a)(2) requires a finding of (a) evident partiality; (b) corruption; or (c) misconduct causing prejudice prior to vacating an award.

The State contends that as Mr. Medusky has provided the parties with the disclosures required by law, and as the Chongs have not presented any proof that Medusky has demonstrated evident partiality, corruption, or misconduct causing prejudice, there is no

<sup>1</sup> It is noted that the HRS §171-17(e) requires that "... each [appraiser] shall prepare and submit an independent appraisal." The "study" prepared by Mr. Shimizu may not meet the requirements of this statute. If the panel determines that the "study" does not meet this standard, it is requested that the same be stricken and disregarded.

basis for vacating an arbitration award.

The State further notes that Medusky is actually fulfilling two roles in this lease process, the first being to serve as an independent appraiser hired by the State to appraise the lease reopening fair market value, and the second being to serve as an arbiter on the arbitration panel. With respect to Medusky's role as the independent appraiser hired by the State, the State notes that he, and indeed every licensed appraiser in the State of Hawaii, is required to follow USPAP standards. HRS §466K-4 includes in pertinent part, "All real estate appraisers who are licensed or certified to practice in this State shall comply with the current uniform standards of professional appraisal practice [**"USPAP"**] approved by the director when performing appraisals in connection with a federally or non-federally related real estate transaction." See Exhibit A.

The subject of USPAP Advisory Opinion 27 is "Appraising the Same Property for a New Client," wherein the "Issue" is stated to be, in pertinent part, "Under what circumstances can an appraiser accept an assignment to appraise a property for a prospective client when that appraiser has previously completed an appraisal of the same property for another client?" The advice provided by USPAP includes "Accepting the assignment from the second potential client is not prohibited by USPAP, assuming any existing confidential information is handled properly. ... If there is a new potential client, valuation services performed for that new client would constitute a new assignment and the assignment results would be specific to that new assignment. Therefore, acceptance and performance of the new assignment to appraise the same property would not be considered revealing the first client's assignment results to the second client, even if the value conclusions were the same. It should be noted that the value conclusion could easily be different if the effective date or the scope of work changed in any manner. It should also be noted that USPAP requires the appraiser to provide an unbiased opinion of value to each client." See Exhibit A.

USPAP, in the same Advisory Opinion 27, then provides the following example: "An appraiser performs an appraisal for a client involved in litigation and then is requested to appraise the same property for the opposing party. Is accepting the assignment for the second client prohibited by USPAP? No, assuming confidential information is handled correctly. ... " See Exhibit A.

In this instance, the effective dates of the assignments undertaken by Medusky for the Chongs and the State differ by ten years. Further, there has been nothing offered by the Chongs, substantive or even merely suggestive, to indicate that Medusky utilized confidential information obtained five years prior (for an appraisal with an effective date ten years prior) in the subject Medusky appraisal.

Therefore, the suggestion by the Chongs of "the appearance of a conflict of interest" is wholly unsupported. Nothing has been offered to suggest that Medusky is in violation of the USPAP standards required of him in his role as a licensed State appraiser contracted

by the State to appraise a lease reopening, nor has anything been offered to suggest grounds to vacate this Panel's arbitration award pursuant to HRS §658A.

### **III. Utilization of the Lease Area**

A. The Beginning: Lease Commencement in 1966. The Lease Area was approved for lease at public auction by DLNR on May 22, 1964. The public auction resulted in the issuance of General Lease No. S-4008, dated September 12, 1966, to the Lessees, as extended by Agreement, dated September 25, 1986.

At the beginning of the Lease, the Chongs stated they maintained at any one time approximately 15 head of cattle, which practice continued until the closure of the slaughterhouse in Waimanalo in the mid-70's. Also, beginning in 1968, the Chongs stated that they placed a residence on the property, being a structure relocated from another locale, and began living on the property, from 1968 and continuing to the present.

Further, at the beginning, the Chongs stated that there was no installed irrigation system anywhere on the leased area. Testimony by the Chongs indicated that, tellingly, they did not bother to research the cost of installing irrigation on the property until recently, "when the rents went up." At that time, they learned from Department of Agriculture staff, corroborated by their own research, that a reasonable estimate would be \$20,000 to install a tank and the necessary piping for an irrigation system. Apparently, at no time did the Chongs attempt to get a firm cost estimate. Meanwhile, the Chongs installed domestic water lines for their residence, but installed these above-ground, so that at the end of the Lease term, this could be removed and presumably salvaged by them.

Upon the closure of the slaughterhouse, the Chongs stated that they discontinued the cattle operation and then used the property for rentals to third parties for "paddocking," i.e. the stabling and pasturing of horses ("to give the horses a rest"), at rents which today average around \$165/month per horse.

Aside from the above use of the property, the Chongs note in their opening "Position Statement," that "Besides ranching, Lessees have attempted to grow some fruit trees and tropical plants over the years. Although not by choice, the primary 'crop' from the beginning of the original lease to the present, has been ti-leaves. *These were never cultivated by Lessees.* The ti plants were already growing 'naturally' when Lessees secured the lease in 1966. The ti plants do not require any additional watering beyond natural rain water and seem to thrive in the shade." Emphasis added.

B. Later and Current Use of the Leased Area: The Chongs stated that both of them were working full-time from the commencement of the Lease in 1966, until their retirement. Walter Chong worked as a full-time engineer for the Army Corp of Engineers, and Evelyn Chong as a full-time teacher. It was stated that both retired in 1983. The use of the property for the paddocking of horses, which began in the mid-70's, continued after their retirement, essentially unchanged to the present. The Chongs stated that, on average, they would have rentals for 2 to 6 horses on the lease area at any one time.

Further, that the rental rate they could charge per horse in keeping with the marketplace, approximately \$165 per year, had remained fairly stable over the years.

The Chongs made limited improvements to the leased area, including a gazebo termed "a horse observation" center or building, which allowed them to claim the expenses as a tax deduction. In addition, the Chongs added an extension to a bedroom on the residence, and a barn for use as storage.

Aside from the improvements described above, and the uses, the leased area has remained relatively unchanged since 1966.

#### **IV. Irrigation**

The Chongs, in their Position Statement, and during the site inspection, repeatedly call attention to the fact that the lease area lacks an irrigation system. This situation existed when the lease was obtained at public auction, and it continues today.

At the lease inception, there existed an irrigation ditch on the downslope of the property near the makai edge, part of the Maunawili Ditch system, formerly maintained by the Department of Agriculture (DOA). Today, the ditch is abandoned, and the Maunawili Ditch system is no longer maintained by DOA.

While the Maunawili Ditch system was in use, the Chongs stated that they did not consider it as a viable source of irrigation water, because a pump would have to be installed to move the water upslope. The next most practical alternative for irrigation, i.e. installing a tank and piping to run from the existing Waimanalo Reservoir, had been cost estimated at about \$20,000 relatively recently, as discussed above.

County water is available at domestic rates established by the Board of Water Supply. This is the existing water supply for the Chong's residence. The County supply line, like the Maunawili Ditch, is located on the downslope of the property, near the makai border. As a result, the Chongs contend that the water pressure is relatively low to the residence and for any potential use for agriculture for the upslope portions of the leased area. Hose bibs running off the County's domestic supply were tested during the site inspection. For the record, State staff present during the site inspection believed the water pressure to be adequate.

Research obtained from the publication "Median Rainfall, State of Hawaii, Circular C88" published in 1982 by DLNR indicates that the two nearest rain gauges to the leased area are gauge 794, "Mokulama," with an annual median rainfall of 41.5 inches, and gauge 795.1, "Waimanalo Exp.," with an annual median rainfall of 41.7 inches. Both of these gauges are further makai of the leased area, the leased area being adjacent to the State Forest Reserve at the base of the Koolau Range. This publication, under the text heading "Aspects of Hawaii Rainfall," discusses how Hawaii's mountains "increase the average annual rainfall from the approximately 25 inches of the surrounding ocean to about 70 inches over the State as a whole." The subject property, being closer to the mountains

than the two referenced rain gauges, would be expected to have annual median rainfall in excess of 41.7 inches. Randy Teruya, Agricultural Asset Manager with the State Department of Agriculture, confirmed that annual median rainfall of 41.7 inches is more than adequate for orchard crops. See Exhibit B.

**V. The income capitalization approach is not the best method of valuation for the subject property where the Chongs are engaged in only a token farming operation; the most appropriate method of valuation is the lease rent comparison approach.**

The Chongs argue that the income capitalization approach is the best method of valuation for the subject property. In support of this, they cite Legislative reports and the passing of House Concurrent Resolution No. 262 adopted by the 2005 Legislature ("Act 262"). In their Position Statement, the Chongs quote the following excerpt from Act 262:

....[I]t is the intent of your Committees that the income capitalization approach specified in this measure consider the income that can reasonably be derived from the quality of soil and other production factors of the leased agricultural lands. *Income derived from token farming operations or severe underuse of fertile agricultural land should not be used as the basis of the income capitalization approach.* (Emphasis added.)

The Panel should note that the Chongs in their Position Statement add emphasis to the first sentence in the quote above, whereas the State now directs the Panel's attention to the second sentence. It is precisely due to the fact that the Chongs are engaging in solely a token farming operation that the income capitalization approach is not the best method of valuation for the subject property.

The Legislature is abundantly cognizant of the fact that many agricultural parcels in the State of Hawaii are engaged in only token farming operations; they reference that fact in the excerpt above. It would be speculative on the part of the State, and outside the scope of this submittal, to surmise why entities engage in merely token farming operations, however, the State offers that the most probable reason is to form a basis for compliance with County zoning laws and lease conditions. In the subject Lease, the Lease states at paragraph 39:

Full utilization of the land. That the Lessee shall, at his own cost and expense, within and during the first year of the lease term, clear the demised premises of noxious plants and, except for such areas as are required for buildings, corrals, etc., shall plant the same to suitable pasture and forage grasses and plants approved by the State Department of Agriculture, and shall tend the premises in such a manner as to reduce to a reasonable minimum the danger of erosion or other waste; and the Lessee shall thereafter and during the remainder of the lease term continue conservation practices consistent with good husbandry and shall utilize the land and the whole of it for the purposes for which this lease is sold; provided, however, that the Lessee shall not undertake any major clearing or grading of the premises except in conformity with a plan of development

approved by the Chairman; such plan to be presented for approval within three (3) months from the effective date of this lease.

Thus, under the terms of the Lease, the Chongs "shall utilize the land and the whole of it for the purposes for which this lease is sold ..." The lease file does not reflect any instance in which the State attempted to enforce this provision, by, for example, issuing a letter of default, or even an advisory letter requesting "full utilization." Nonetheless, the provision exists, and recognizing this and considering the potential that the State would attempt to enforce this Lease provision, the Chongs did take some limited actions to use the lease area for pasture purposes, for approximately 15 cattle, and later for up to approximately 6 horses.

Yet, the State contends, the Chongs, by Walter Chong's statements at both the site visit and at the arbitration hearing, and by empirical evidence observed during the site inspection, never really attempted a "full utilization" of the leased area. Walter Chong advised the Panel that "it was not a vocation," and "I was never in it to make money." Indeed, he stated that his efforts to increase the economic productivity of the land coincided with each step-up in lease rent charged by the State. For the 17 year period from Lease commencement in 1966 until their retirement in 1983, the Chongs both held full-time employment not associated with the Lease. Even after their retirement, Walter Chong stated that they used their retirement money to subsidize their living expenses because "it is well known that farmers don't do well." The rainfall data for the property, as discussed above, was more than adequate for orchard crops. Yet, there was nothing offered by the Chongs to suggest that they ever mounted a sustained effort to plant orchards to increase productivity, nor even an attempt to harvest what existed naturally.

The State contends that the site inspection was self-evident in demonstrating that much more could have been done to clear the land, to increase its productivity for grazing purposes and for orchard purposes. Even the cost of irrigation, estimated at \$20,000, does not appear to the State to be a significant capital investment if the Chongs ever actually intended to fully utilize the land, and make it their vocation.

The Chongs, in their position statement, offer the Panel their income data in support of using the income capitalization approach:

Lessees are willing to provide this Panel with documentation confirming their annual income for the past 5 years (or more) derived from their use of the subject property should the Panel agree the "yield approach" be used.

The State contends that this annual income documentation is meaningless if the Panel agrees, as the State contends, that the Chongs have engaged in only a token farming operation.

The Chongs, in their Position Statement, quote from a Senate Committee report on Act 292:

In many parts of Hawaii, state lands are used for agricultural purposes, and as state agricultural leases are reopened, appraisals of lands are used to determine appropriate lease rents. **A common way to appraise agricultural land is by comparing the appraised property with other land sales; however this method leads to problems, as this approach tends to inflate lease rents. ....**

The income capitalization approach is a more accurate application as it appraises the value of the agricultural land based on its agricultural yield; **however there is a shortage of appraisers who are capable of using this approach ....**

(Emphasis retained, as quoted in the Chong's Position Statement).

The State contends, however, that the concern regarding reliance on land sales is entirely misplaced in the valuation of the subject property, because there is no necessity for the Panel to rely on **land sales**; there is substantial, relevant data of comparable **lease rents** for the Panel to base its valuation upon, as discussed below.

The States notes, also, that both the Shimizu Report and the Medusky Appraisal, rely upon lease rent comparison data, and not land sales, to derive their valuations. Similarly, during the prior arbitration of the subject property, for the ten year period effective September 11, 1996, the appraisers then appraising the property, Ray Benedictus and Audrey Abe, also utilized lease rent comparison data to derive their valuations.

The State contends, therefore, that the Chong's concerns are misplaced. The State does not ask the Panel to rely upon land **sales** to derive its valuation, there is ample, relevant data of comparable lease **rents**.

#### **VI. Residential use is the highest and best use of the leased area**

The Lease provides at paragraph 18:

18. Character of use. That the Lessee shall use the demised premises for general agriculture as such use is hereinafter defined in Paragraph 42(a) (Definitions) of this lease; provided, however, that all rights of subdivision, and application for zoning or rezoning shall be reserved to the Lessor and shall not be permitted to the Lessee.

However, significantly, the Lease also provides at paragraph 38:

38. Residence use. That the Lessee may, but shall not be required to, maintain his residence (or that of his agent but not of both of them except as provided herein) on the demised premises; provided, however, that not more than one single-family dwelling shall be permitted on the demised premises except that the Lessor may, in its discretion, permit additional employee housing if the need for such housing is clearly demonstrated, and construction of such additional housing shall require the prior written consent of the Lessor. Such additional housing shall be for employee housing only and shall in no case and at no time during the term of this lease be used for rental purposes.

As discussed above, every licensed appraiser in the State of Hawaii is required by HRS §466K-4 to follow USPAP standards. The 2006 Edition of USPAP includes Standards Rule 1-3, which includes in pertinent part:

When necessary for credible assignment results in developing a market value opinion, an appraiser must:

(b) develop an opinion of the highest and best use of the real estate. See Exhibit C

The Medusky Appraisal identifies "Highest and Best Use" as follows:

Highest and Best Use: Lease restricts use for general agriculture purposes. Lessee may maintain its residence or that of its agent (not both) on the demised premises.

Thus, at least one of the two reports before the Panel identifies "Highest and Best Use" as including a residence. The State agrees with this analysis, and contends that it is the most significant provision in the Lease affecting its valuation. As the subject Lease allows for a residence, its valuation should be significantly higher than other comparable properties that do not allow for a residence. Indeed, the three most relevant comparables, as cited below, in terms of location, character of use, irrigation, slope and topography, all do not allow for a residence, and thus their valuations should be significantly lower.

And not just any residence. The Chong's residence, as positioned on the leased area, provides an idyllic setting offering a spectacular view of the ocean and the iconic Mokulua Islands offshore, with the majestic Koolau Range serving as backdrop. In addition to the magnificent view planes of both mountains and sea, it offers (1) privacy; (2) quiet; and (3) the ambience of a lush, sylvan environment unfettered with development. As a residential setting with a buffer of over 20 acres of leased area separating the subject property from its neighbors, most of which do not allow for a residence, it is perfectly ideal. Indeed, the State contends that it should be no mystery to the Panel why the Chongs chose to pursue this property at public auction, and why it has remained nearly entirely undeveloped, for over 40 years. The highest and best use of the leased area is for a residence. The lease allows for such a use, and befittingly, that is how the Chongs have chosen to use it.

Buttressing this point of view is that the Chongs could have added an employee dwelling, yet declined to do so, thus preserving their privacy, the quiet and the ambience of their rural setting. It is precisely because the Chongs used the property for its highest and best use, i.e. as their residence, that they were unconcerned about developing the land for a greater economic return, i.e. by planting more orchards, or by cultivating and harvesting what grew naturally, e.g. the ti leaves (Chong's Position Statement: "These were never cultivated by Lessees.") The site inspection showed that the leased area included flourishing trees with mangoes, tangelos, pomelos and jabons. The Chongs stated that



they did not bother to harvest or bring to market any of these plants, except the ti leaves. The State contends this was so because the Chongs used the property almost solely and exclusively for their residence, agriculture was not their vocation, and the abundant plant life existed for setting, ambiance and for the buffer that it provided between their residence and the neighboring properties.

The highest and best use of the leased area is for a residence. This, in fact, is how the property is being used, and this is how it should be valued. The residential component should thus be valued separately and accorded primary consideration in setting of rent for this property.

## **VII. The most relevant comparables**

If the Panel does agree with the Lessees that the property should be valued primarily based upon the agricultural component of the lease, the State contends that the most relevant comparable lease rents, in terms of location, character of use, irrigation, slope and topography, are the three cited below:

GL No.:	S-5708
TMK:	(1) 4-1-027:016
Lessee:	Landscape Hawaii, Inc.
Area:	19.961 acres
Effective Date:	3/23/2006
Annual Rent:	\$36,500
Rent per Acre:	\$1,829
Character of Use:	Intensive agriculture or pasture
Residential Use:	<u>No</u> primary residence allowed
Comments:	Sold at public auction in 2004. Adjacent to and immediately across the street from the Chong's property, formerly occupied by Candy Lake.

GL No.:	S-5168
TMK:	(1) 4-1-027:018
Lessee:	Akamai Landscaping and Maintenance Service
Area:	6.52 acres
Effective Date:	4/14/2001
Annual Rent:	\$5,250
Rent per Acre:	\$805
Character of Use:	Diversified agriculture
Residential Use:	<u>No</u> primary residence allowed; one employee dwelling allowed
Comments:	Lease reopened in 1995 and 2001; original bid at public auction was at \$32,300 per annum, then reopened at \$3,240 per annum in 1995. Just below the Chong's property.

GL No.:	S-5658
TMK:	(1) 4-1-027:018

Lessee:	Akamai Landscaping and Maintenance Service
Area:	9.565 acres
Effective Date:	12/1/2002
Annual Rent:	\$6,887
Rent per Acre:	\$720
Character of Use:	Intensive agriculture
Residential Use:	<u>No</u> primary residence allowed; one employee dwelling allowed
Comments:	Sold at public auction in 2002 at the upset rent. Just below the Chong's property

The above three properties are the most relevant due to:

Location:	The three comparables are in the immediate area of the subject property, and may be described as adjacent.
Character of Use:	The three comparables and the subject property all allow for agriculture; the subject property is more permissive in that it also allows for a residence, as discussed above, and therefore should be afforded a significantly higher valuation.
Irrigation:	None of the three comparables, nor the subject property, were leased with an existing irrigation system.
Slope and topography:	The three comparables and the subject property all share a similar slope and topography.

The State contends that the most relevant property of the three above is the first, the lease at public auction to Landscape Hawaii, Inc. The lease contract is the most recent in time, while the property is adjacent to the subject and at the same elevation. In addition, the State contends that because the lease rent was established by public auction, the rate per acre is a truer indicator of the current fair market value than the other two comparables, where the current lease rent was not determined at public auction.

**VIII. The State is acting in good faith; the subject Lease has not been transferred to the Department of Agriculture**

At the hearing on February 6, 2007, Robert A. Chong, Esq., on behalf of his parents, Walter and Evelyn Chong, made a statement to the effect that the State "may not be operating in good faith", since he had heard "a rumor" that the subject Lease was already under the jurisdiction and management authority of the Department of Agriculture, pursuant to Act 90, Session Laws of Hawaii 2003 ("Act 90").

The Board of Land and Natural Resources ("**the Board**"), at its meeting of December 9, 2005, acting pursuant to Act 90, approved staff's recommendation "That the Board, subject to the Board of Agriculture approval ... Approve and recommend to the Governor the issuance of an executive order setting aside the subject lands to Department of

39 changed in any manner. It should also be noted that USPAP requires the appraiser to provide an unbiased  
40 opinion of value to each client.

41 **Obtaining a Release:**

42 As a matter of business practice, some appraisers request a release from a prior client before accepting an  
43 assignment to appraise the same property for a new client or to disclose the assignment for the second  
44 client to the first client. However, USPAP does not require this. Also, appraisers should be aware that, in  
45 some cases, informing a client about the existence of another client and the fact that the property was  
46 appraised for that other client may not be compliant with the portion of the Confidentiality section of the  
47 ETHICS RULE, which states:

48 *An appraiser must protect the confidential nature of the appraiser-client relationship.*

49 **Confidential Information:**

50 In all assignments the appraiser must comply with the Confidentiality section of the ETHICS RULE with  
51 respect to the handling of confidential information. Confidential information is defined in USPAP as:

52 *information that is either*

- 53 • *identified by the client as confidential when providing it to an appraiser and that is not*
- 54 *available from any other source; or*
- 55 • *classified as confidential or private by applicable law or regulation*

56 The Confidentiality section of the ETHICS RULE states:

57 *An appraiser must be aware of, and comply with, all confidentiality and privacy laws and*  
58 *regulations applicable in an assignment.*

59 *An appraiser must not disclose confidential information . . . . to anyone other than the client and*  
60 *persons specifically authorized by the client . . .*

61 If a prior assignment included any confidential information, its disclosure to a different client or intended  
62 user would violate the ETHICS RULE if the information were still classified as confidential information.  
63 This includes the requirement to comply with all confidentiality and privacy laws and regulations.

64 **Client Expectations:**

65 At times, an appraiser's client may believe that his or her legitimate business intent could be harmed by that  
66 appraiser providing an appraisal of the subject property of that assignment to another client. In such cases,  
67 the client and the appraiser may stipulate in their service agreement the conditions under which the  
68 appraiser may or may not appraise the same subject property. A client involved in litigation may stipulate  
69 that the appraiser cannot appraise a subject property for the opposing party in that litigation. As another  
70 example, if an appraiser is providing the value of a property to a client who is planning to sell that property  
71 in an auction, the appraiser and client may agree that the appraiser will not appraise the same property for a  
72 party planning to participate in the bidding process.

73 **Illustrations:**

74 **Example A – Litigation**

75 An appraiser performs an appraisal for a client involved in litigation and then is requested to appraise the  
76 same property for the opposing party. Is accepting the assignment for the second client prohibited by  
77 USPAP?

Agriculture under the terms and conditions cited above ... " (Additional standard conditions omitted.) See Exhibit D.

According to Randy Teruya, Agricultural Asset Manager with the Department of Agriculture, the Board of Agriculture met in December 2006 and approved acceptance of the subject lands.

As of today's date, February 20, 2007, the transfer of the subject lands is pending preparation and execution of the Governor's executive order ("the EO"). Such an EO typically takes a number of months (sometimes, years) to prepare and finalize. In any event, it has not yet occurred, nor has any estimated timetable been established.

At present, the two affected State departments, i.e. DLNR and DOA, are working on a Memorandum of Agreement for an interim management transfer pending execution of the EO. This, too, does not yet have an estimated timetable for completion.

The State has always acted in good faith throughout the course of this arbitration process. The Chongs, since they are the party that has suggested this subject to the Panel, should have the burden of proving their point. The State contends the suggestion is wholly without merit.


#### **IX. Conclusion**

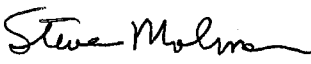
In conclusion, it is the position of the State that the rent determined by Medusky & Co., Inc., represents no less than the fair market value for the subject property. For the foregoing reasons, the DLNR respectfully requests that the Panel make the following determination:

Fair Market Rental for the five-year period commencing on September 11, 2006:

Annual Rent: \$11,300 per annum

Respectfully submitted

  
Cyrus Chen  
Appraisal Manager

  
Steve Molmen  
Supervising Land Agent

cc: Randall K. Ishikawa, Deputy Attorney General  
Robert A. Chong, Esq.  
Oahu District Branch  
Central Files

# EXHIBIT "A"

## ADVISORY OPINION 27 (AO-27)

*This communication by the Appraisal Standards Board (ASB) does not establish new standards or interpret existing standards. Advisory Opinions are issued to illustrate the applicability of appraisal standards in specific situations and to offer advice from the ASB for the resolution of appraisal issues and problems.*

**SUBJECT: Appraising the Same Property for a New Client**

**APPLICATION: Real Property, Personal Property, and Intangible Property**

### THE ISSUE:

Situations often arise in which appraisers who have previously appraised a property are asked by a different party to appraise the same property. In some instances this request arises very soon after the first appraisal; in others, it may be months or years later. Under what circumstances can an appraiser accept an assignment to appraise a property for a prospective client when that appraiser has previously completed an appraisal of the same property for another client?

### ADVICE FROM THE ASB ON THE ISSUE:

#### Relevant USPAP & Advisory References:

- Confidentiality section of the ETHICS RULE.
- Statement on Appraisal Standards No. 9, which addresses intended use and intended users in an assignment.
- Advisory Opinion 25 which covers clarification of the client in a federally related transaction.
- Advisory Opinion 26 which addresses reappraising/transferring a report to another party.

Accepting the assignment from the second potential client is not prohibited by USPAP, assuming any existing confidential information is handled properly.

Several parts of the Confidentiality section of the ETHICS RULE are pertinent to this matter.

*An appraiser must not disclose . . . assignment results prepared for a client to anyone other than the client and persons specifically authorized by the client . . .*

An appraiser cannot disclose the results of a particular assignment, performed for a particular client, to anyone other than those designated by that client. However, an understanding of the definitions of *assignment*, *assignment results*, and *client* are key to a complete understanding of this requirement.

*Assignment – a valuation service provided as a consequence of an agreement between an appraiser and a client*

*Client – the party or parties who engage an appraiser (by employment or contract) in a specific assignment*

*Assignment Results – an appraiser's opinions and conclusions developed specific to an assignment*

As can be seen in the definitions, both the client and the assignment results are specific to an assignment. If there is a new potential client, valuation services performed for that new client would constitute a new assignment and the assignment results would be specific to that new assignment. Therefore, acceptance and performance of the new assignment to appraise the same property would not be considered revealing the first client's assignment results to the second client, even if the value conclusions were the same. It should be noted that the value conclusion could easily be different if the effective date or the scope of work

No, assuming confidential information is handled correctly. However, there are common business practices in such circumstances. Often, the opposing parties each hire an appraiser to appraise the subject property. If the opposing parties do not plan to hire one appraiser jointly, each party could make it a part of the agreement between the appraiser and the client (the engagement letter or contract) that the appraiser is not to appraise the property for anyone representing the opposing side of the legal action.

In the absence of such an agreement between the client and the appraiser, the appraiser should consider the presence of confidential information. The knowledge of confidential information may prevent the appraiser from accepting the second assignment. The appraiser must decline the second assignment if:

- 1) the appraiser used confidential information in performing the first assignment;
- 2) that information would not be available from any other source; and
- 3) credible results cannot be derived without the use of this confidential information.

However, the appraiser may accept the second assignment, making sure to not disclose any confidential information from the original assignment to the second client, if

- 1) the information is available from another source (meaning it is not *confidential information*, as defined); or
- 2) the *confidential information* is not material to deriving credible assignment results.

However, the appraiser must ensure that confidential information is not disclosed, even if it has no impact on the assignment results (such as the litigation strategy of attorneys representing the first client).

#### **Example B – Competing Banks**

If an appraiser has appraised a property for Bank A and then is approached by Bank B to appraise the same property, does USPAP prohibit acceptance of the second assignment?

No, assuming confidential information is handled correctly. This constitutes a second assignment, a new client and a new agreement between a client and an appraiser.

*This Advisory Opinion is based on presumed conditions without investigation or verification of actual circumstances. There is no assurance that this Advisory Opinion represents the only possible solution to the problems discussed or that it applies equally to seemingly similar situations.*

Approved June 27, 2003

LINDA LINGLE  
Governor



EXHIBIT "B"

SANDRA LEE KUNIMOTO  
Chairperson, Board of Agriculture

DUANE K. OKAMOTO  
Deputy to the Chairperson

State of Hawaii  
DEPARTMENT OF AGRICULTURE  
1428 South King Street  
Honolulu, Hawaii 96814-2512  
Phone: (808) 973-9600 Fax: (808) 973-9613

February 20, 2007

HON.07.027

Mr. Steve Molmen  
Supervising Land Agent  
Land Division  
Department of Land & Natural Resources  
Oahu District Land Office  
1151 Punchbowl Street, Room 220  
Honolulu, HI 96813

Dear Steve:

This letter is response to your request for confirmation on the adequacy of rainfall in Waimanalo for the cultivation of orchard crops. Rainfall research obtained from the publication, "Median Rainfall, State of Hawaii, Circular C88" published in June 1982 by DLNR indicates a rain gauge near the leased area, gauge 795.1, "Waimanalo Exp", measured an annual rainfall of 41.7 inches. This median rainfall is adequate for orchard crops.

Sincerely,

A handwritten signature in cursive script that reads "Randolph Y. Teruya".

RANDOLPH Y. TERUYA  
Agricultural Asset Manager  
Agricultural Asset Management Branch



# Oahu Rainfall

## EXHIBIT "B"

(INCHES)

STATE KEY NO.	GAGE NAME	RECORD YEARS	ANNUAL MEDIAN	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
780.00	DOWSETT HILANDSI	14	104.3	8.7	7.9	14.5	9.4	7.2	6.3	9.1	6.0	6.4	8.9	11.7	12.8
791.00	KANEOME MAUKA	47	69.9	6.9	5.0	5.3	5.1	3.5	2.4	3.7	3.7	3.5	5.4	6.3	6.6
791.20	KANEOME-GOWING	10	52.6	5.5	4.5	4.9	3.4	2.8	1.9	3.1	2.5	3.4	3.9	3.4	6.9
792.00	LOWER LAUKAHA	86	128.6	10.1	9.2	11.7	11.5	9.4	8.0	9.2	9.5	7.6	9.1	11.4	11.0
793.00	NUUANU RESERV 4	70	128.6	10.0	8.3	11.5	10.4	9.3	7.3	8.7	10.0	7.5	8.7	11.7	11.1
793.10	LANIHULI	24	73.1	6.4	5.8	6.0	7.2	6.9	4.7	5.1	6.6	7.0	5.6	6.6	4.6
793.30	OLD PALI ROAD	15	119.5	10.8	8.7	12.1	10.7	9.3	5.5	8.0	6.6	6.0	8.5	12.4	9.1
794.00	PAUNA FLATS	49	172.2	13.8	11.3	14.4	14.8	12.7	11.5	14.0	14.0	9.6	10.9	13.5	13.4
795.00	MANHIA-HSPA	47	159.2	11.9	9.6	13.2	13.7	12.7	10.6	14.8	13.8	9.6	10.6	12.6	12.6
796.00	NUUANU PALI	48	91.1	8.2	7.4	8.1	7.1	6.1	3.8	5.6	5.3	4.7	7.2	8.5	8.2
797.00	MAUNAWILI RANCH	60	78.9	5.9	5.7	7.1	6.6	4.9	3.6	4.1	5.1	4.3	5.0	6.9	8.1
797.10	MAUNAWILI	24	80.8	9.2	6.1	7.8	6.3	5.3	2.4	4.8	3.8	4.4	6.8	8.2	7.3
798.00	ST STEPHENS STE	33	76.5	7.9	6.0	7.8	5.5	4.0	2.6	3.8	3.8	3.5	4.8	6.7	7.5
798.10	PALI GOLF COURSE	10	77.0	8.3	6.2	7.9	6.5	4.5	2.4	4.5	2.7	3.9	6.8	8.0	8.6
799.00	KONAIKANUI	14	88.2	8.0	5.9	8.5	7.8	6.1	5.3	4.9	6.6	6.0	6.7	7.7	5.8
799.00	HAWAII YOUTH	19	47.2	4.3	4.0	6.5	2.6	2.4	1.4	1.9	2.0	1.9	3.4	4.3	5.1
799.10	KAILUA FLD LAD	49	62.3	6.1	4.9	5.5	4.0	3.4	1.8	2.7	2.9	2.6	4.4	5.2	5.7
799.60	MAUNAWILI CIRCLE	18	67.6	9.3	5.3	6.6	4.9	3.9	2.0	3.4	2.8	3.3	5.3	5.8	8.3
799.00	KAILUA CAMP	15	41.8	3.7	3.6	4.2	2.7	1.5	1.1	1.5	1.5	1.8	1.7	2.9	3.4
799.30	KAILUA FIRE STA	17	37.5	6.0	2.9	4.1	2.9	2.1	1.2	1.8	1.1	1.4	2.3	4.1	3.3
799.60	KAIMAKE LOOP	12	42.5	7.7	4.0	3.2	3.3	2.5	1.3	2.1	1.4	1.8	2.6	4.8	5.4
799.80	KAILUA-DAHLGREN	14	37.1	7.3	3.0	3.4	2.6	2.8	0.9	2.1	1.1	1.3	1.9	3.8	5.1
799.00	MAUNAWILI RESERV	22	63.7	7.5	5.1	5.4	4.0	3.1	1.9	2.4	3.2	2.5	5.0	5.4	6.2
799.00	MOKULAMA	71	41.5	4.1	3.4	3.9	2.5	1.7	0.9	1.3	1.4	1.5	2.4	3.7	5.2
799.10	WAIMANALO EXP	24	41.7	6.3	4.0	4.5	3.0	1.6	0.8	1.2	1.3	1.2	2.6	5.4	5.3
799.00	MAKAHA KAI (25)	48	20.3	2.4	2.0	1.5	0.8	0.4	0.1	0.2	0.4	0.6	1.1	1.1	2.4
799.00	KAMAILE PUMP	28	21.4	2.2	2.1	1.2	0.8	0.6	0.2	0.1	0.4	0.5	0.9	1.1	2.1
799.00	WAIANAE	73	21.3	2.3	2.0	1.3	0.7	0.5	0.1	0.2	0.4	0.5	0.7	0.9	2.1
800.00	MAKAHA VALLEY	24	33.0	4.0	3.4	2.4	1.2	0.9	0.4	0.4	0.6	0.8	1.8	1.6	4.5
800.10	MAKAHA RESERV	10	27.3	3.7	1.9	3.8	0.9	2.1	0.1	0.9	0.2	0.6	1.1	2.2	3.2
801.00	WAIANAE VY (40)	20	18.3	2.3	2.2	0.9	0.9	0.4	0.1	0.1	0.4	0.4	0.6	0.9	1.2
802.00	WAIANAE VY (330)	37	28.1	4.1	2.9	2.0	1.1	0.5	0.2	0.3	0.4	0.6	1.1	1.9	3.7
802.10	DUHAWAI	13	28.8	3.2	5.3	2.6	1.6	0.9	0.9	0.8	1.2	1.2	2.1	1.7	1.9
803.00	WAIANAE MAUKA	67	68.1	7.2	6.1	6.0	4.8	4.0	3.2	3.6	3.4	3.1	3.8	5.4	8.5
803.10	LUALUALEI WATUNN	10	48.9	6.2	5.6	5.6	3.8	2.8	1.6	2.8	2.1	1.9	3.1	3.7	7.5
804.00	LUALUALEI	37	23.5	3.4	1.9	2.0	1.0	0.8	0.4	0.5	0.3	0.9	1.1	1.9	3.2
804.10	KOLEKOLE	18	42.6	4.6	4.0	3.0	2.4	1.6	1.8	1.2	1.4	1.4	3.6	2.4	3.1
805.00	LEILEHUA CAMP	49	43.7	4.7	4.3	4.0	2.2	1.4	0.8	1.3	1.3	1.6	2.3	3.4	4.6
806.00	KURIA-CPC	49	39.0	5.0	3.5	3.2	2.2	1.3	0.8	1.1	1.0	1.3	2.2	3.2	4.2
807.00	CAMP R4-CPC	51	32.3	3.5	2.8	2.7	1.5	1.0	0.5	0.7	0.7	1.1	2.0	2.3	3.1
808.00	FIELD 32	28	41.0	6.9	4.4	3.4	1.7	1.3	0.7	1.1	0.8	0.9	2.6	3.5	4.5
809.00	FIELD 33	32	38.5	4.3	3.9	2.7	1.9	1.2	0.6	0.9	1.0	0.0	2.0	3.3	1.9
809.10	FIELD 56	10	35.1	5.9	4.3	2.9	1.1	0.5	0.4	0.5	1.4	0.5	1.2	2.5	4.8
810.00	WHEELER FIELD	30	38.2	3.6	3.7	3.5	2.5	2.2	1.2	1.5	1.4	2.1	2.2	2.7	4.8
811.00	FIELD 233	43	35.1	3.7	2.8	2.9	1.9	1.1	3.7	0.9	1.0	1.1	2.1	2.6	4.2



**Standards Rule 1-3**

**When necessary for credible assignment results in developing a market value opinion, an appraiser must:**

- (a) identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends; and

Comment: An appraiser must avoid making an unsupported assumption or premise about market area trends, effective age, and remaining life.

- (b) **develop an opinion of the highest and best use of the real estate.**

Comment: An appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the appraiser's highest and best use conclusion(s).

**Standards Rule 1-4**

**In developing a real property appraisal, an appraiser must collect, verify, and analyze all information necessary for credible assignment results.**

- (a) When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.

- (b) When a cost approach is necessary for credible assignment results, an appraiser must:

- (i) develop an opinion of site value by an appropriate appraisal method or technique;
- (ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and
- (iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).

- (c) When an income approach is necessary for credible assignment results, an appraiser must:

- (i) analyze such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property;
- (ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property;
- (iii) analyze such comparable data as are available to estimate rates of capitalization and/or rates of discount; and
- (iv) base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence.<sup>13</sup>

<sup>13</sup> See Statement on Appraisal Standards No. 2, *Discounted Cash Flow Analysis*.

EXHIBIT "D"

0-1

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.: \_\_\_\_\_

STATEWIDE

Set Aside to Department of Agriculture for Agriculture  
Purposes, Statewide.

APPLICANT:

Department of Agriculture

LEGAL REFERENCE:

Section 171-11, Hawaii Revised Statutes (HRS), as amended.  
Act 90, Sessions Laws of Hawaii 2003.

LOCATION:

Portion of Government lands situated Statewide and identified by  
Tax Map Keys as shown on the attached map labeled Exhibit A.

AREA:

See Exhibit B, to be further determined by DAGS Survey Division.

ZONING:

State Land Use District: See Exhibit B  
County Zoning Ordinance: See Exhibit B

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: See Exhibit B

CURRENT USE STATUS:

See Exhibit B

PURPOSE:

Agriculture purposes.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

This action before the Board is merely a transfer of management jurisdiction and does not constitute a use of State lands or funds, and therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements. Inasmuch as the Chapter 343 environmental requirements apply to Applicant's use of the lands, the Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.

APPLICANT REQUIREMENTS:

Not applicable

BACKGROUND:

The Legislature in 2003 found that certain public lands classified for agricultural use by the Department of Land and Natural Resources (DLNR) should be transferred and managed by the Department of Agriculture (DOA) for the development of farms on as widespread a basis as possible which is established by Article XI, Section 10 of the State Constitution. This resulted in the passing and signing of Act 90, Session Laws of Hawaii 2003. (Exhibit C) Later, Act 235, Session Laws of Hawaii 2005 passed establishing a non-agricultural park lands special fund at DOA for the collection of lease rents, fees, penalties, and any other revenue or funds collected from non-agricultural park lands that are transferred, or in the process of being transferred from DLNR to DOA.

Act 90 also specified certain conditions of the encumbered agricultural lands to be transferred, such as the tenant shall not be in arrears in the payment of rent or taxes, and shall otherwise be in full compliance with the terms and conditions of the leases or permits. The proposed list of agricultural lands to be set aside to DOA is attached hereto as Exhibit B.

DOA and DLNR staff have meet on several occasions to discuss the intent of Act 90 and the proposed list of properties to be transferred. The Staffs from both DOA and DLNR both agree that the set aside should move forward in a manner that would effectuate a smooth and efficient transition from the management of agricultural leases from DLNR to DOA. Accordingly, the staff at DOA and DLNR has agreed that the transfers will occur incrementally, starting with the islands of Hawaii and Molokai, with the other islands to follow, in an order that is agreed upon between the respective staffs at DOA and DLNR. The proposed list of properties to be transferred (Exhibit B) is required to be approved by both this Board and the Board of Agriculture.

REMARKS:

Agricultural leases or permits encumber a majority of the

properties to be set aside, but a limited number are vacant. Although it is staffs' belief that the spirit and intent of Act 90 was to transfer over to DOA those lands that were encumbered with agricultural leases, DOA's staff requested some unencumbered lands be included. Based on the State land use classification and county zoning, the highest and best for the properties to be transferred is agricultural purposes. The existing agricultural use will continue unchanged. DOA is charged with maintaining agricultural lands and water resources for Hawaii's diversified agriculture industry. DOA is also tasked with making lands available to small farmers for a reasonable fee and a long-term tenure.

The lands currently set aside to DOA are only for the development and management of agricultural park purposes, in accordance with Chapter 166, Hawaii Revised Statutes and its related administrative rules.<sup>1</sup> DOA has four (4) agricultural parks on Oahu with a total of 58 lots, one (1) agricultural park on Molokai with 22 lots, four (4) agricultural parks on Hawaii with a total of 133 lots, and one (1) agricultural park on Kauai with 19 lots.

Staff believes it is appropriate to set aside encumbered agricultural lands to DOA because DOA better understands the issues confronting farmers, and provides information and other services that help the business farmer, such as pesticide information, water for irrigation purposes, etc., akin to a one-stop shop for farmers. Staff also believes that one of the purposes of Act 90 was to help ensure that agricultural lands be used for agricultural purposes on a long-term basis. While private landowners maybe developing their agricultural lands into upscale residential subdivisions, the proposed transfer to DOA will help assure that these agricultural lands are used for agriculture purposes, for as long as possible.

Comments were solicited and their statements are listed below:

DHHL	No response
Historic Preservation	Kauai properties - no objections
Division of Forestry & Wildlife	No objections
Division of State Parks	No comments
Division of Water Resource Management	No response
City & County of Honolulu, DPP	Three Waimanalo tenants have violations (GL #4298, #3762, #3774). No objections
County of Maui, Dept. of	No comments


<sup>1</sup> Thus, staff believes that at least one of the purposes of Act 90 was to transfer over to DOA the management and control of certain encumbered agricultural lands that are not necessarily designated as an "agricultural park" under Chapter 166, HRS.

Planning	
County of Hawaii, Planning Dept.	No response
County of Kauai, Dept. of Planning	No response
OHA	No response

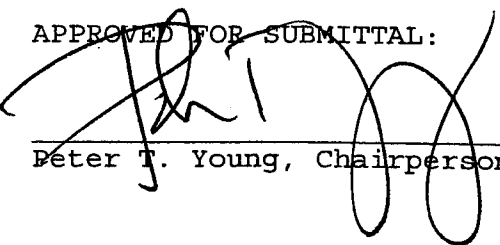
RECOMMENDATION: That the Board:

1. Subject to the Board of Agriculture approval.
2. Approve of and recommend to the Governor the issuance of an executive order setting aside the subject lands to Department of Agriculture under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:
  - A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
  - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

  
Charlene E. Unoki  
Assistant Administrator

APPROVED FOR SUBMITTAL:

  
Peter T. Young, Chairperson

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

March 30, 2007

Walter & Evelyn Chong Trust  
41-902 Kaulukonu Street  
Waimanalo, HI 96795

Dear Lessee:

Subject: NOTIFICATION OF NEW RENT  
Ground Rent for General Lease No. S-4008; Waimanalo, Oahu; TMK: (1)  
4-1-27: 14

We have received the attached arbitration panel findings that determined the new rent under General Lease No. S-4008 shall be \$9,930 per annum for the time period September 11, 2006 to September 10, 2011. We have instructed our Fiscal Office to change the rent accordingly.

If you have any questions regarding this requirement, please contact the Oahu District Branch at (808) 587-0433.

Very truly yours,

A handwritten signature in black ink, appearing to read "Russell Y. Tsuji".

RUSSELL Y. TSUJI  
Land Division Administrator

Enclosure

cc: Oahu District Branch  
Central Files

EXHIBIT "C"

### DECISION OF THE ARBITRATORS

This Decision of the Arbitrators, dated this 27th day of March 2007, is made by the Arbitrators below named pursuant to General Lease No. S-4008 (Lease) covering the demised premises by and between the State of Hawaii, by its Board of Land and Natural Resources (Lessor) and Walter F.L. Chong and Evelyn Z. Chong (Lessee), for the five-year period beginning September 11, 2006.

The demised premises are described in the Lease and consist of Lot 38 Waimanalo Agricultural Subdivision, Waimanalo, Koolau-poko, Oahu, Hawaii. The demised premises is further identified as tax map key 4-1-27:14 of the First Taxation Division, having an area of 20.388 acres.

In accordance with the procedure for appointment of appraisers as specified in the Lease, Jan R. Medusky, MAI, CRE has been appointed by the Lessor, Mitsuo Shimizu has been appointed by the Lessee, and Paul D. Cool, MAI, CRE has been appointed by Messrs. Medusky and Shimizu.

In accordance with Lease, the Arbitrators have determined the annual rent for the five-year period beginning September 11, 2006 to be:

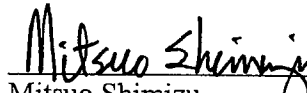
**NINE THOUSAND NINE HUNDRED THIRTY DOLLARS**  
**(\$9,930).**

IN WITNESS THEREOF, the Arbitrators have duly executed and acknowledged this decision on the day and year first above written.

Concurs:

Does Not Concur:

  
Jan R. Medusky, MAI, CRE

  
Mitsuo Shimizu

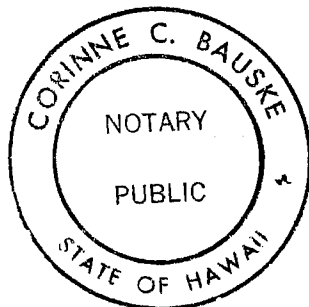
  
Paul D. Cool, MAI, CRE

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU

SS:

On this 27th day of March 2007, before me personally appeared Jan R. Medusky, MAI, CRE and Paul D. Cool, MAI, CRE to me known to be the persons described in and who executed the foregoing instrument and who acknowledged that they executed the same as their free act and deed.



*Corinne C. Bauske*  
Corinne C. Bauske

Notary Public, State of Hawaii

My commission expires: 5.18.2007

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU

SS:

am up.  
On this <sup>am up</sup> 28th day of March 2007, before me personally appeared Mitsuo Shimizu to me known to be the person described in and who executed the foregoing instrument and who acknowledged that he executed the same as their free act and deed.

LS

*Naomi Masuda*

Naomi Masuda

Notary Public, State of Hawaii

My commission expires: Apr. 19, 2008



Walter and Evelyn Chong  
41-902 Kaulukānu St.  
Waimanalo, HI 96795  
April 28, 2008

RECEIVED  
ADMIN SVCS OFFICE  
2008 APR 28 AM 10:27  
DEPT OF LAND &  
NATURAL RESOURCES

TO: Central  
FROM: ODLO

No.:

GLS-4008

DLNR  
Fiscal Office  
P.O Box 621  
Honolulu, Hawaii 96809-0621

Re: Document Number gl4008

Dear Gentlepersons:

Enclosed, please find a check payable to "Land & Natural Resources" in an amount which reflects our annual lease rent for our leased lands for the period of 9/10/96 to 9/10/2006. We disagree with the new lease rent that was improperly determined by the arbitration panel's finding for the remaining 5 years on our lease.

I am providing you with a copy of my letter to Chairperson Laura H. Thielen dated October 30, 2007. Also enclosed is a copy of my son's (attorney Robert A. Chong's) letter to Representative Tommy Waters and Ombudsman Robin Mitsunaga dated March 12, 2007 requesting their assistance in our dispute with the DLNR over the methodology of land appraisals used in 2006 for the Waimanalo Agricultural Subdivision. These appraisals, including the one that was used by the DLNR for our property, were done by DLNR's contracted appraiser, Jan Medusky, using an improper appraisal method in complete disregard of our Legislature's mandate on how these agricultural lands were supposed to have been appraised.

Kindly direct this letter and the enclosures to the appropriate personnel in DLNR so that they are aware of our ongoing dispute over the determination of our annual lease rent for the remaining 5 years of my lease rent.

Very truly yours,

*Walter F. L. Chong*

Walter F. L. Chong

Enclosures

cc: Representative Tommy Waters (w/out encls.)

RECEIVED  
LAND DIVISION  
2008 APR 28 P 2:23  
DEPT OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

EXHIBIT "D"

GL4008

Walter and Evelyn Chong  
41-902 Kaulukanu Street  
Waimanalo, HI 96795  
October 30, 2007

Laura H. Thielen, Interim Chairperson  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809

Ref: OD-GL4008  
TMK: (1) 4-1-27:14; Waimanalo, Oahu

Dear Ms. Thielen:

This acknowledges receipt of a "NOTICE OF DEFAULT" dated October 5, 2007.

Please be advised we disagree with the arbitration panel's finding that determined our new lease rent to be \$9,930 per annum for the last 5 years remaining on our lease. This is for the period of September 11, 2006 to September 10, 2011. This amount is almost three (3) times what we were paying annually for the past 10 years (9/10/96 to 9/10/06) which had only been re-determined by a prior arbitration panel in October 2001 to be \$3,500 per annum. For the DLNR to **triple our rent** for the final 5 years on our property which we have farmed/ranched since 1966 (40+) years is unconscionable. The DLNR is fully aware this property cannot generate this sort of income to justify this high lease rent. More important, the so-called "appraisals" the 2007 arbitration panel relied upon and the process they followed which established this purported new lease rent did not comply with the intent of the Legislature. **The DLNR's own instructions stated in its 2001 Report and 2006 Report to the Legislature on the methodology that was supposed to be used to determine annual lease rent for Waimanalo agricultural lands were not followed.**

We are in the process of challenging our purported new lease rent through both the Legislature and the Ombudsman's office. We would be delighted to meet with you as well so you can learn first hand how the DLNR is essentially forcefully evicting us from this land by tripling our lease rent for the remaining 5 years of our lease. Until this matter is successfully resolved and a new lease rent is properly determined as mandated by our Legislature, please find enclosed a check payable in the amount of \$875.00 covering the period of September 11, 2007 to December 10, 2007.

Very truly yours,

*(S) Walter F. L. Chong*  
Walter F. L. Chong

Enclosure

644008

## AYABE, CHONG, NISHIMOTO, SIA & NAKAMURA

ANN H. ARATANI  
SIDNEY K. AYABE\*  
ROBERT A. CHONG  
STEPHEN G. DYER  
PATRICIA T. FUJII  
STEVEN L. GOTO  
KENNETH T. GOYA  
GAIL M. KANG  
RONALD T. MICHIOKA  
GARY S. MIYAMOTO  
RICHARD F. NAKAMURA  
LAWRENCE H. NAKANO  
JOHN S. NISHIMOTO  
ZALE T. OKAZAKI

A LAW CORPORATION\*

A LIMITED LIABILITY LAW PARTNERSHIP

PAUHI TOWER, SUITE 2500  
1001 BISHOP STREET  
HONOLULU, HAWAII 96813-3429  
TELEPHONE (808) 537-6119  
FAX (808) 526-3491

Writer's e-mail: robert.chong@hawadvocate.com

RONALD M. SHIGEKANE  
JEFFREY H. K. SIA  
PHILIP S. UESATO  
MICHAEL J. VAN DYKE  
J. THOMAS WEBER  
DIANE W. WONG  
JODI L.K. YI  
CALVIN E. YOUNG

Of Counsel:  
DAVID A. GRUEBNER  
EDMUND K.U. YEE

RODNEY S. NISHIDA  
(1949 - 2004)

March 12, 2007

The Honorable Tommy Waters  
State Capitol - House of Representatives  
415 So. Beretania Street, Room 322  
Honolulu, Hawaii 96813

Mr. Robin Matsunaga  
Ombudsman  
465 So. King Street, 4th Floor  
Honolulu, Hawaii 96813

Re: **HOLDING DLNR ACCOUNTABLE FOR IMPROPER  
RE-DETERMINATION OF FAIR MARKET RENT FOR STATE  
AGRICULTURAL LEASES, WAIMANALO AGRICULTURAL  
SUBDIVISION, 2006.**

Dear Representative Waters and Mr. Matsunaga:

I am currently involved in representing my parents, Walter and Evelyn Z. Chong, in an arbitration proceeding to re-determine their annual lease rent for the last 5 years remaining on their 45 year lease with the State (the Lessor). My parents are farmers (the Lessees) of a 20+ acre parcel of agricultural land located in the Waimanalo Agricultural Subdivision. Acting on behalf of the Lessor, the Land Division of the State's Department of Land and Natural Resources ("DLNR") seeks to raise my parents' annual lease rent by 310% based on a 2006 appraisal of their leased land by one of the DLNR's privately retained land appraisers.

In the course of preparing for and attending the arbitration of my parents' annual lease rent, I discovered the purported "fair market annual rent" sought by Lessor was based on a highly questionable land appraisal. The DLNR's appraiser used a method of land appraisal of my parents' leased State agricultural land which the Legislature had instructed the DLNR not to use dating as far back as 1996 and again, as recently as 2005.

The Honorable Tommy Waters  
Mr. Robin Matsunaga  
March 12, 2007  
Page 2

**None of the appraisals that were done in the Waimanalo Agricultural Subdivision at the behest of the DLNR in 2006 were performed using the methodology of land appraisal for agricultural leased land recommended by the Legislature.** During the actual arbitration proceeding for my parents' lease reopening held on February 6, 2007, both the DLNR's representatives and their appraiser testified the DLNR had hired him (through the State's procurement process) to appraise the majority of the Waimanalo agricultural leased lands that had come up for reopening and lease rent re-determination in 2006. During the arbitration itself, the DLNR's representatives produced documents to support Lessor's position entitled "Recent Waimanalo Comp ags" which were copies of pertinent sections of other land appraisals by their appraiser, none of which had been done using the income capitalization approach to land appraisal or with any consideration to the income that could be derived from the quality of soil on the property as mandated by the Legislature.

#### **The Pendency of the Current Arbitration**

**This letter seeks to call your attention to what appears to be a pervasive problem affecting other farmers and ranchers in the Waimanalo Agricultural Subdivision whose lease rents were re-determined or in the process of being re-determined by the DLNR in 2006. This letter is not intended in anyway to have the Ombudsman or the Legislature specifically influence the outcome or decision of the arbitrators following their deliberations in my parents' case.**

The evidentiary portion of the pending arbitration involving my parents' lease is essentially complete. The parties (my parents and the Lessor) are presently awaiting the arbitration award from the 3 member panel of arbitrators comprised of the Lessor's appraiser, the Lessees' appraiser, and a 3<sup>rd</sup> appraiser selected by the two. The timing of this letter to your respective offices was specifically delayed until after the deadline for post-arbitration submissions has passed. **The deadline for the arbitrators' decision is Thursday, March 22, 2007.**

#### **Purpose of this Complaint**

**Unless the DLNR's Land Division is held accountable for lease rents which were improperly determined by them in 2006, they will presumably enforce the collection of same from the affected farmers and ranchers. Just as important, the DLNR seems intent on continuing its practice of thumbing their nose at the Legislature and turning a deaf ear to the many farmers and ranchers holding Waimanalo agricultural leases that come up for renewal in the years ahead.**

The Honorable Tommy Waters  
Mr. Robin Matsunaga  
March 12, 2007  
Page 3

The DLNR seems so pre-occupied with increasing the State's revenues derived from Waimanalo agricultural leases that they have essentially ignored the economic concerns of the individual farmers and ranchers, many of whom have already had their leases extended by Lessor. For example, my parents' lease was originally for 20 years. It was extended by DLNR for another 25 years in September 1985. In many instances in 2006, the DLNR has doubled and, in one instance even tripled (as with my parents) the annual lease rents based on land appraisals which did not follow the proper method of appraisal for agricultural land mandated by the Legislature.

The purpose of this complaint is to assist those Waimanalo farmers and ranchers who were wrongfully affected by the DLNR's improper re-determination of their annual lease rent in 2006. Many of them would have probably liked to have challenged the Lessor's rent re-opening and re-determination of their annual rent, but they simply lack the time, money, and resources to commence an effective challenge. As an example, the professional fees alone for the 3<sup>rd</sup> appraiser/arbitrator in my parents' arbitration is \$6500, divided equally between the Lessor and the Lessee. This amount is in addition to each parties' own responsibility for the professional fees and costs for hiring their own appraiser and legal representative. The reality is for most farmers affected by the DLNR's improper determination of their annual lease rent, the cost alone for the individual farmer to launch a challenge would likely be more than what they would pay in rent for an entire year!

#### **The DLNR's Complete Disregard for the Preferred Method for Appraising Leased Waimanalo Agricultural Lands**

In 1996, the Legislature ordered the DLNR to conduct a study to address the problems of State agricultural lessees associated with increased lease rents, inconsistencies in lease rent determinations, and a perceived lack of specific statutory authority. The study was to have been completed and reported to the Legislature the following year. See Act 109, Session Laws of Hawaii, Regular Session of 1996 (SLH). For whatever reasons, the DLNR submitted its report to the 2001 Legislature in a report dated February 2001 (four years late) entitled, "A Comprehensive Review of the Provisions of Chapter 171, HRS." A copy of this report is attached as Exhibit "A" and shall be referred to hereafter as the "*2001 Report*."

As noted in the Introduction of the *2001 Report*, the 1996 Senate specifically instructed the DLNR to "listen to the farmers."

The DLNR should be instructing the independent land appraisers they contract with on what approaches are to be used for "rent re-openers and renegotiated rents" when it comes to agricultural lease rent concerns. The *2001 Report* states in pertinent part:

The Honorable Tommy Waters  
Mr. Robin Matsunaga  
March 12, 2007  
Page 4

To address the agricultural lease rent concerns, the department shifted how it instructed independent appraisers to approach rent re-openers and renegotiated rents. The department first applied this approach in 1997. In the past, appraisals were based on fee sales (comparables) to determine the agricultural lease rent. That approach, however, resulted in agricultural lease rents being tied to fluctuations in the real estate market. While fee simple real estate values are influenced by supply and demand, the agricultural yield from the property does necessarily track the fluctuations in fee simple values. Using the yield approach to appraising agricultural lease rents allows the department to assess the potential agricultural value of the property and thus determine the rent based on an averaging of various crop types. This approach is less easily influenced by fluctuations in the real estate market caused by speculation (e.g., Japanese investment bubble).

The department's in-house appraisal staff began exploring the crop yield approach to value in 1996 and tried to achieve full implementation of the approach by the end of 1997. To date, the department has enjoyed good cooperation from most of the independent appraisers, especially on Kauai and the Big Island. All department in-house appraisals for agricultural land rely on either the crop yield approach or the lease comparable approach, with limited exceptions. See pages 7 – 8. Emphasis added.

Unfortunately, the DLNR has NOT “listened” to the farmers, at least not the farmers and ranchers in Waimanalo, Oahu. Instead, the Department hired independent land appraisers who appraised State agricultural lease properties to determine lease rents using a direct market comparison approach. As a result, the 2005 Legislature (House), passed House Concurrent Resolution No. 262 requesting the DLNR to establish a training program to train real estate appraisers to use the income capitalization approach to set lease rent rates for State agricultural lease re-openings. See Exhibit “B.”

The House Committee on Agriculture and Water, Land, & Ocean Resources reported to Speaker Calvin Say that the purpose of this resolution was to stabilize state agricultural lease rents. They state in pertinent part as follows:

... [I]t is the intent of your Committees that the income capitalization approach specified in this measure consider the income that can reasonably be derived from the quality of soil and other production factors of the leased agricultural lands. Income derived from token farming operations or severe underuse of fertile agricultural land should not be used as the basis of the income capitalization approach. *Emphasis added.*

The Senate Committee on Water, Land, and Agriculture reported to then Senate President Robert Bunda on House Concurrent Resolution No. 262, that the DLNR submitted testimony in support of this measure which would *inter alia* establish a pilot program to implement the income capitalization approach for re-openings of state agricultural leases. See Exhibit "B." The Senate Committee went on to report:

In many parts of Hawaii, state lands are used for agricultural purposes, and as state agricultural leases are reopened, appraisals of lands are used to determine appropriate lease rents. A common way to appraise agricultural land is by comparing the appraised property with other land sales; however this method leads to problems, as this approach tends to inflate lease rents. ... the income capitalization approach is a more accurate application as it appraises the value of the agricultural land based on its agricultural yield; however there is a shortage of appraisers who are capable of using this approach. ... *Emphasis added.*

On March 31, 2006, the DLNR held a training seminar in conjunction with the Hawaii Chapter of the Appraisal Institute. As mandated by House Concurrent Resolution No. 262 adopted by the 2005 Legislature, the DLNR submitted its report dated November 2006 to the 24<sup>th</sup> Legislature, Regular Session 2007 (hereinafter referred to as **2006 Report**) on the pilot program to train appraisers to use the income approach to set lease rent rates for state agricultural lease re-openings. They reported the seminar was well attended by local appraisers, but only one (1) farmer was in attendance. In its recommendation to the 2007 Legislature, the DLNR states in relevant part the purpose of HCR 262 HD1:

HCR 262 HD1 reflects the State's interest that agricultural lands be used productively and in a reasonable way to emphasize sustainability and preservation of State agricultural land. The Farm Bureau believes continuing the current practice of determining lease rents based on land value via the sales

The Honorable Tommy Waters  
Mr. Robin Matsunaga  
March 12, 2007  
Page 6

**comparison approach will increase lease rents to potentially unaffordable levels, given the recent dramatic escalation of real estate values.**

In their recommendation the DLNR acknowledged their present method of determining agricultural rents produced both inconsistent and at times unfair lease rents.

Based on the DLNR's own instructions stated in its *2001 Report* and *2006 Report* the preferred methodology used to determine the annual lease rent for Waimanalo agricultural lands should have been based on the *income capitalization approach* or at the minimum, an appraisal that considers the income that can reasonably be derived from the quality of soil and other production factors from the land.

### **What Really Happened in 2006**

**Rather than comply with the intent of what House Concurrent Resolution No. 262 had called for in the appraisal method of State agricultural lease lands, the State's appraiser in 2006 for Waimanalo leased lands specifically and deliberately EXCLUDED this information from his appraisals! Contrary to what the DLNR may want the Legislature and your office to believe in terms of compliance with the 2001 Report and the 2006 Report, NOT one of the 2006 appraisals of Waimanalo leased agricultural land was based on the income capitalization approach. Indeed, the appraiser with whom DLNR contracted to perform the majority of the appraisals in Waimanalo did not bother to attend the course that DLNR specifically sponsored and held on March 31, 2006 to train appraisers on the correct method of appraising agricultural land!**

An examination of the aforementioned appraiser's standard limiting conditions and assumptions for all of his appraisals for the DLNR simply assumed the "...soil conditions to be satisfactory for existing and potential development ..." of the Waimanalo leased land he was appraising. Rather than consider the quality of the soil and the other production factors of the individual farmer's or rancher's leased land, he simply assumed they were all "satisfactory." In flagrant disregard of the Legislature's intent, he even went further and disclaimed any responsibility for any valuation of the land based on soil quality or production factors of the land.

### **CONCLUSION**

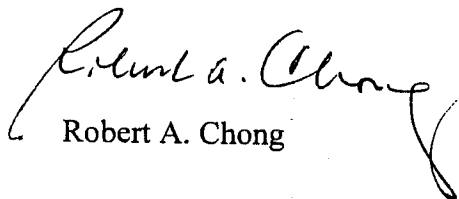
The DLNR needs to be held accountable for the wrongful determination of annual lease rents in 2006 for farmers and ranchers whose properties are located in the Waimanalo Agricultural Subdivision. If your investigation into these allegations against the DLNR prove true, the DLNR should be required at their own expense to have their hired appraiser(s) re-



The Honorable Tommy Waters  
Mr. Robin Matsunaga  
March 12, 2007  
Page 7

appraise the affected leases using the income yield approach and/or takes into consideration the quality of the soil and other production factors of the land being appraised. Any annual lease rent already re-determined by the DLNR based on the improper appraisal method should be set aside and redone properly based on a valid appraisal.

Very truly yours,

  
Robert A. Chong

RAC:dmo  
326288

Enclosures

## INTRODUCTION

This final report to the Legislature complies with the requirements of Act 109, Session Laws of Hawaii, Regular Session of 1996 (SLH). Chapter 171, Hawaii Revised Statutes (HRS) was amended by the Legislature on numerous occasions in response to various needs, problems, and issues since its re-enactment in Act 32, SLH 1960, following Hawaii's admission as a state.

Act 109, SLH 1996, provides, in part:

The purpose of this Act is to direct the department of land and natural resources to conduct a comprehensive review of the provisions of chapter 171, HRS, in order to address various problems faced by lessees of state lands.

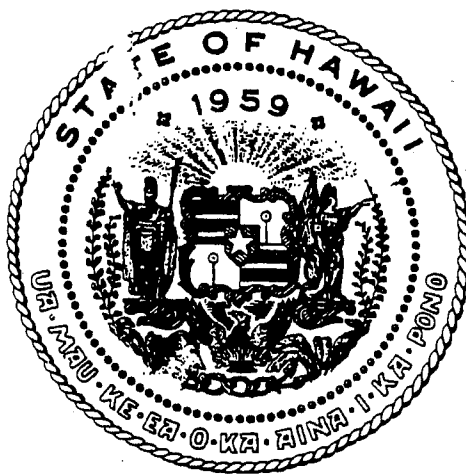
Pursuant to Act 109, SLH 1996, the department of land and natural resources (the "department" or "DLNR") hired a consultant to assist in the comprehensive review. The members of the Consultant Project Team are listed in Appendix 1. The primary goal of the consultant project was to identify problems perceived by lessees and others dealing with the department with regard to public land leases and permits. Its objectives included providing opportunities for stakeholders and the public in general to participate in the review process. The Senate specifically instructed the DLNR to "listen to the farmers." (Standing Committee Report 2690 dated April 4, 1996, relating to House Bill 3293, HD 1, SD 1).

In authorizing the funds for this review under Act 109, SLH 1996, the State Legislature was fundamentally concerned with the problems of agricultural lessees associated with increased lease rents, inconsistency in determining lease rents, and a perceived lack of statutory specificity. The Legislature wanted the department to address these problems. As described below, the information ultimately gathered from the department's lessees and stakeholders confirmed that the Legislature's focus on certain problems of agricultural lessees was timely and appropriate. Also as described below, the department's responsive actions were likewise tailored to address these specific problems.

REPORT TO THE TWENTY-FIRST LEGISLATURE  
REGULAR SESSION 2001

ON

A COMPREHENSIVE REVIEW  
OF THE PROVISIONS OF CHAPTER 171, HRS



STATE OF HAWAII

MAR 23 2001

LEGISLATIVE REFERENCE BUREAU

Prepared by

The Department of Land and Natural Resources  
State of Hawaii

in response to

Act 109, Session Laws of Hawaii 1996

Honolulu, Hawaii  
February 2001

EXHIBIT A

## COMPREHENSIVE REVIEW

As required by Act 109, SLH 1996, the approach taken by the consultant was comprehensive. The consultant examined the entire statute from a wide range of perspectives and perceptions. Act 109, SLH 1996, also required the department to conduct public hearings "to determine the concerns and problems faced by all lessees under chapter 171, HRS." The consultant project was designed, therefore, to invite a wide range of comments and suggestions. Interviews and meetings were held with key stakeholders. A compilation of comments from these meetings is attached as Appendix 2. Statewide public information meetings were scheduled, advertised, and conducted. Information regarding the public information meetings is attached as Appendix 3. Follow-up discussions were held and written comments were invited to allow lessees and other stakeholders to express their complaints and grievances. A statewide survey of department lessees was conducted to solicit their concerns and viewpoints. A summary of the questionnaire responses is attached as Appendix 4.

In gathering the information, the consultant was not asked to opine on the merits of any specific comments made by various stakeholders. All comments were assumed to be bona fide, legitimate, and worthy of attention.

### STATEWIDE INFORMATION GATHERING

Most of the State's public lands are unencumbered, located in forest reserves and devoted mainly to watershed purposes. The largest number of DLNR leases are for lands on the Big Island of Hawaii, followed by department leases on the islands of Kauai and Oahu. Relatively few department leases are in the County of Maui. Oahu, nonetheless, leads the other counties in terms of lease rent.

Although most of the lease rent is produced by commercial and industrial leases, the biggest discontent seemed to emanate from the DLNR's agricultural leases.

An initial round of eight public information meetings was held in June and July 1997 on five islands, including three on the Big Island of Hawaii, to solicit public views and comments.

A questionnaire was distributed in June 1997 to approximately half the DLNR's lessee's throughout the State to incorporate their perspectives into the review. Please refer to Appendix 4 for a summary of the lessee's comments.

At the end of the information gathering, the consultant catalogued concerns in the following major areas: (i) the roles of the Board of Land and Natural Resources ("Land Board") and Legislature, and (ii) the application of specific sections of chapter 171, HRS.

#### THE ROLE OF THE LAND BOARD AND THE LEGISLATURE: COMMENTS FROM DEPARTMENT STAFF

According to the consultant team, many of the department's land managers perceive that the State lacks a clear mission statement for administering public lands. These staff members perceive conflicting, unclear, and undefined goals. Some of the land managers, for example, are unclear whether public lands are a "revenue" or "use" trust, and whether such models are incompatible.

The consultant also reported that some of the department's staff perceives that both the Legislature and the Land Board choose to participate in site-specific, administrative, and disposition decisions on behalf of constituent interests. These staff members maintain that the Land Board devotes an inordinate amount of attention, as exhibited by its agenda, to dispositions and administrative approvals instead of setting policies or adopting administrative rules for the department staff to implement. These staff members believe that disjointed, incremental decisions have long been the norm, not the exception. They also believe that the Land Board has wide discretion, is not held accountable for its decisions and, therefore, wields tremendous power. Further, they believe that the Land Board has little time or inclination to evaluate the performance of assets or to make plans to reposition assets in anticipation of future opportunities.

Some department staff members maintain that neither the staff nor the tenants know what to expect from the Land Board. They believe that micro-management by the Legislature and the Land Board creates additional work for the department, lengthens the process of disposition and approval, frustrates the department's customers, detracts from the marketability of

public lands and undermines the ability of trust managers to be proactive. They also believe that unqualified applicants may obtain leases and better qualified potential lessees are deprived of the opportunity to lease public lands when the Land Board directs staff to lease lands to certain lessees.

Some DLNR land managers believe that dispositions and minor administrative approvals by the Land Board are unwieldy, increase the workload of staff, take too much time and cause some clients to turn elsewhere to lease land.

#### THE ROLE OF THE LAND BOARD AND THE LEGISLATURE: COMMENTS FROM AGRICULTURAL STAKEHOLDERS

According to the Hawaii Farm Bureau Federation, Chapter 171, HRS, covers all public land, but has no clear direction. Farmers do not know the "ground rules." The DLNR has no rules to follow, and farmers do not know what to expect. Thus, every matter seems to be negotiated on a case-by-case basis with the department land managers.

The Hawaii Farm Bureau Federation believes that the Land Board should function as a policy board or an appeals board, not an executive board. The items on its agenda are far too detailed and are inappropriate.

In the eyes of the Hawaii Farm Bureau Federation, the Board of Agriculture, on the other hand, acts as a policy board, even though it is designated by statute as an executive board. The Board of Agriculture is not involved in day-to-day decisions and approvals. The Chairperson of the Board of Agriculture has the discretion to decide what needs to be presented to the board for approval.

According to the Hawaii Farm Bureau Federation, the Legislature is now the farmers' only recourse.

#### THE ROLE OF THE LAND BOARD AND THE LEGISLATURE: COMMENTS FROM CONSERVATION STAKEHOLDERS

According to the Hawaii Association of Conservation Districts, the Land Board is much too political and should not be concerned about who leases

the land, nor should it direct the staff to lease the land to certain lessees. The Hawaii Association of Conservation Districts contends that the DLNR is pointed in different directions. It needs continuity and coordination.

#### THE ROLE OF THE LAND BOARD AND THE LEGISLATURE: COMMENTS FROM OTHER AGENCIES

The consultant observed that Chapter 171, HRS, has been amended by the Legislature on numerous occasions to benefit a wide range of interest groups. The statute, moreover, is closely related to other statutes and is very difficult to amend without affecting other departments. Policies in the form of Land Board policy guidelines or administrative rules that apply only to DLNR would be easier to amend and may be more appropriate.

The State Department of Agriculture's agricultural parks program is governed by a short statute and detailed rules that follow Chapter 171, HRS. The State Department of Hawaiian Home Lands is tied by references to Chapter 171, HRS, and would prefer not to be tied to the statute at all, not even by reference. Chapter 171, HRS, is the State Department of Transportation's guiding reference. The DOT prefers to slim down the statute and expanding the rules. Section 171-11, HRS, significantly affects the administration and disposition of the public lands the DOT leases for industrial, commercial, conservation, and concession uses.

The Natural Resource Conservation Service, U.S. Department of Agriculture, believes that the DLNR's inconsistency stems from both the Legislature and the Land Board.

#### THE APPLICATION OF CHAPTER 171: COMMENTS FROM DEPARTMENT STAFF, AGENCIES AND STAKEHOLDERS REGARDING LEASING POLICIES AND PROCEDURES

The costs of conducting public auctions, appraisals, advertising, and administration expenses are often too high, as perceived by DLNR land managers, in comparison to the rents derived from the property. Disposition and administrative requirements have little or no relationship to anticipated revenues.

All the auction costs must be borne by the State if the parcel is not leased. Maintaining a "permanent" register of potential applicants to be notified of dispositions, for example, is costly and difficult. Few of the recipients bid on the properties.

The Hawaii Farm Bureau Federation pointed out that appraisals are costly, often exceed the annual rent generated and are not necessary in most cases, especially for lands of the same type on the same island.

Land agents and staff, who spend a great deal of time responding to maintenance problems, complaints and inquiries from tenants, board members, elected officials, other public agencies and the public in general, often do not have enough time to prepare properties for timely disposition.

The State DOT observed that the DLNR is short-handed compared to the DOT, whose costs are borne by special funds, not general fund appropriations. The DOT's spending plans, of course, must still be approved by the Legislature. The staffs of the Airports and Harbors Divisions have grown as revenues have increased during the past 20 to 30 years. The DLNR is perceived to be more reactive; it does not have enough staff or time to be proactive.

Faced with rising costs and shrinking State budget, the DLNR must compete with other agencies for general fund appropriations. Unlike the State DOT, relatively few of DLNR's costs are borne by special funds. Thus, duties are often not performed in a timely manner, requests may take a long time to process, and leases may not be enforced at times.



## **RECOMMENDED ACTIONS BY THE DEPARTMENT IN RESPONSE TO THE FINDINGS GENERATED BY THE COMPREHENSIVE REVIEW**

In reviewing the findings of the comprehensive review, two distinct themes emerge: (1) the specific concerns of lessees regarding the "nuts and bolts" issues relating to lease rents and lease administration, and (2) the more generalized, philosophical concerns regarding the underlying policies and structures which govern the basic nature and operation of the Public Land Trust. In preparing this report and in formulating actions to respond to the findings of the comprehensive review, the department chose to focus on the immediate concerns of its lessees, especially agricultural lessees, and to take steps to remedy those concerns as quickly as possible. The department's approach was designed to conform to the legislative intent underlying Act 109, SLH 1996. Asset portfolio management, the clarification (or redefinition) of the mission of the Public Land Trust, and the shift of certain aspects of land management authority from the Land Board or Legislature to other entities, are all important philosophical issues, the resolution of which could conceivably result in a wholesale revamping of Chapter 171, HRS. But addressing these issues is not prerequisite to addressing the immediate and specific concerns of the Legislature when it enacted Act 109, SLH 1996. In fact, the current statutory structure under Chapter 171, HRS, coupled with the Land Board's policy-making authority and sensible and practical implementation by staff, provides a sufficient and appropriate measure of flexibility in public land management to address the issues which animated the passage of Act 109, SLH 1996. The specific actions undertaken by the department to address these issues are set out below.

### **YIELD FROM LAND VS. FEE VALUE**

To address the agricultural lease rent concerns, the department shifted how it instructed independent appraisers to approach rent re-openers and renegotiated rents. The department first applied this approach in 1997. In the past, appraisals were based on fee sales (comparables) to determine the agricultural lease rent. That approach, however, resulted in agricultural lease rents being tied to fluctuations in the real estate market. While fee

simple real estate values are influenced by supply and demand, the agricultural yield from the property does necessarily track the fluctuations in fee simple values. Using the yield approach to appraising agricultural lease rents allows the department to assess the potential agricultural value of the property and thus determine the rent based on an averaging of various crop types. This approach is less easily influenced by fluctuations in the real estate market caused by speculation (e.g., Japanese investment bubble).

The department's in-house appraisal staff began exploring the crop yield approach to value in 1996 and tried to achieve full implementation of the approach by the end of 1997. To date, the department has enjoyed good cooperation from most of the independent appraisers, especially on Kauai and the Big Island. All department in-house appraisals for agricultural land rely on either the crop yield approach or the lease comparable approach, with limited exceptions.

#### SCREENING COMMITTEE TO PRE-QUALIFY BIDDERS

The department first used a screening committee to pre-qualify bidders in October and November 1996. This was done to ensure that potential bidders for agricultural leases were qualified farmers, ranchers or persons who had given thought to the financial and land management requirements for agricultural endeavors. The department's intent was to eliminate speculators from bidding on state leases and driving the lease rents higher with little or no intention of using the property for agricultural purposes. The department also required a business plan to ensure that the prospective bidders understood how to use the lease property. Members of the screening committee included representatives from the Hawaii Farm Bureau Federation, the Hawaii Association of Conservation Districts, and the State Department of Agriculture. This limited the bidding to those with actual interest in agribusinesses and limited the effect of speculators from driving up the lease rents with no economic basis.

#### INCREASED NUMBER OF PUBLIC AUCTIONS FOR LEASES

The Department, in conjunction with the use of a screening committee, tentatively set internal goals of having public auctions every quarter. The department discovered, however, that while more auctions are preferable, the

time it takes to prepare for the auction does not allow the department to hold auctions every quarter. The department has defined a more realistic goal of 2-3 per year depending on the availability of properties. The department also found that while there is a general demand to get more state leases out to public auction, the real limiting factor to putting out more lease may be the number of qualified bidders.

### COMPUTERIZATION OF PROPERTY MANAGEMENT FUNCTIONS

Since 1999, the department has undertaken a comprehensive computerization of its land property management functions. Before selecting the specific hardware and software components for the project, the department undertook an analysis and task-by-task breakdown of all the property management functions within the land division. This led to a consolidation of many functions and processes, resulting in increased efficiency, better lease enforcement, and quicker processing of leases. This has, and will, help address many of the administrative concerns expressed by the department's lessees.

## CONCLUSION

The actions of the department described above are merely the most recent steps in the constant process of refining and improving its administration of the Public Land Trust under Chapter 171, HRS. The department intends to brief the Land Board on other perceived problems and concerns raised during the comprehensive review. The department will also brief the Land Board on those issues which could require fundamental changes to Chapter 171, HRS, including adjustments of the role or authority of the Land Board, the Governor or the Legislature.

As discussed above, Chapter 171, HRS, currently provides a suitable framework to set different management policies for different land uses and tenants. The department will work with the Department of the Attorney General to assist the department's land management staff to better understand the parameters of the type of public land trusts created in Hawaii by the United States congress and the Hawaii Constitution.

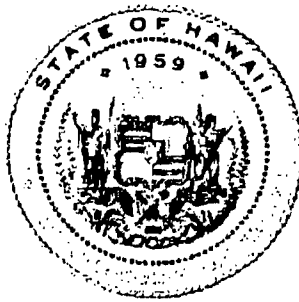
In this context, the trust models used by other states could be considered to some extent with regard to exploring better ways to manage assets that can be managed solely for income producing purposes. See Appendix 5 for a discussion of trust models applicable in certain western states.

While Act 109, SLH 1996, requested draft rules and proposed statutory changes, the department has not submitted such work product pending further discussions regarding the larger policy issues behind such proposals. Furthermore, the majority of the immediate concerns expressed by the Legislature and the department's lessees could and can be addressed without wide-ranging statutory amendments.

REPORT TO THE TWENTY- FOURTH LEGISLATURE

REGULAR SESSION OF 2007

PILOT PROGRAM TO TRAIN APPRAISERS TO USE INCOME APPROACH TO SET  
LEASE RENT RATES FOR STATE AGRICULTURAL LEASE REOPENINGS



Prepared by

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

In response to House Concurrent Resolution 262 House Draft 1, Regular Session of 2005

Honolulu, Hawaii

November 2006

EXHIBIT B

REPORT TO THE TWENTY- FOURTH LEGISLATURE  
REGULAR SESSION OF 2007

PILOT PROGRAM TO TRAIN APPRAISERS TO USE INCOME APPROACH TO SET  
LEASE RENT RATES FOR STATE AGRICULTURAL LEASE REOPENINGS

**PURPOSE**

House Concurrent Resolution (HCR) 262 House Draft (HD) 1, was introduced during the 2005 Legislative Session and subsequently adopted, at the urging of the Hawaii Farm Bureau (Farm Bureau), requesting the Department of Land and Natural Resources (DLNR) to establish a training program in conjunction with the local real estate appraisers' national organization as part of their professional educational seminars, to train real estate appraisers to use the income capitalization approach to set lease rent rates for State agricultural lease reopenings, and to report its findings and recommendations, including the lease rent amounts resulting from using this methodology, to the Legislature no later than 20 days prior to the convening of the Regular Session of 2007.

HCR 262 HD1 reflects the State's interest that agricultural lands be used productively and in a reasonable way to emphasize sustainability and preservation of State agricultural land. The Farm Bureau believes continuing the current practice of determining lease rents based on land value via the sales comparison approach will increase lease rents to potentially unaffordable levels, given the recent dramatic escalation of real estate values.

**POINTS MADE AS TO WHY THE TRAINING IS NEEDED**

HCR 262 HD1 asserted that appraisers lack the knowledge or understanding necessary to use the income approach, which factors in the agricultural yield of farmed land. HCR 262 HD1 further asserted that there is a shortage locally of appraisers who are capable of using the income capitalization approach. Thus, the Concurrent Resolution reports training is needed to encourage appraisers to use the income approach to establish reasonable lease rent rates for State agricultural lease reopenings.

**PLANNING AND ORGANIZING TRAINING**

As HCR 262 HD1 stipulated, the training program was to be established in conjunction with the local real estate appraiser's national organization, the Hawaii Chapter of the Appraisal Institute (HCAI), which sponsors much of the education related to the MAI designation and state licensing. MAI is a nationally recognized designation for appraisers demonstrating they have achieved a level of experience and education in the profession. Members that are undesignated include appraisers that are working toward designation or professionals who work in the real estate field who desire membership in the Appraisal Institute but do not wish to pursue designation.

HCAI was requested by DLNR to assist in implementing the pilot training program. However, at the time of adoption of HCR 262 HD1, HCAI had already booked their educational offerings for 2005 and for the spring of 2006. Also, it was concluded that any additional class would be in conflict with their sponsored classes if held in the same month. The American Society of Farm Managers and Rural Appraisers (ASFMRA) assisted in gaining continuing education credits from the Department of Commerce and Consumer Affairs, which was deemed critical to the success of the training program. Tony Correia, a respected agricultural appraiser, was contacted and retained to teach the class.

During the months leading up to the class, Mr. Correia requested DLNR to acquire data to be used for case studies during the class. Mr. Correia indicates the University of California, Davis (UC Davis) maintains a comprehensive database containing current revenue and expense data from different agricultural operations throughout the State of California. Unfortunately, the University of Hawaii (UH) does not have a database with the same level of detail as that of UC Davis. Mr. Correia tried contacting the Agricultural Economics Program at UH but couldn't get the data required for a good case study. DLNR assisted in getting income and expense data and asked the Farm Bureau for assistance.

### **TRAINING SEMINAR**

Attendance was excellent for the Agricultural Lease Rent Training Seminar (Seminar) held March 31, 2006. An estimated 90 people attended, primarily local appraisers from various private firms and organizations statewide, including a sizable government contingent from the City and County of Honolulu's Real Property Tax Assessment Office. Representatives from the Department of Agriculture (DOA) also attended. One farmer attended, however no representative from the Farm Bureau attended. It should be noted that the Seminar occurred during a period of torrential rains, which likely impacted attendance by farmers.

The Seminar included basic valuation methodology and theory. A power point slide show was used for graphics and other visual aids. Attendees were allowed to ask questions throughout the Seminar.

There was ample discussion as to obstacles for local appraisers to perform an income approach on agricultural leases. Despite some of the language in HCR 262 HD1, commercial appraisers can generally perform an income approach given adequate data. Most of the income approach problems stem from a lack of relevant data. It appears that farmers may have historically been hesitant to release such data for fear that it may result in adverse tax consequences. Over the course of preparation for the Seminar, Mr. Correia and DLNR attempted to gain actual farm revenues and expense data from the Farm Bureau, but were unable to gain usable data.

### **RECOMMENDATION**

In order to conduct appraisals using the income capitalization approach, there should be an adequate agricultural database with current market data and sufficient detail that can serve as a resource for the appraisers. The information supplied by UH is fairly general and dated.

Perhaps an agricultural research entity could be asked to assist in establishing such a database with relevant and current market data.

Accurate and reliable agricultural operation data needs to be provided by tenants, thus giving the Hawaii appraisal community the tools to do their job adequately. If these goals are accomplished via a joint effort, then consistency and fairness in agricultural rents can be achieved.



STAND. COM. REP.  
NO. 1818

Honolulu, Hawaii

, 2005

RE:  
H.C.R.  
No. 262

H.D. 1

Honorable Robert Bunda  
President of the Senate  
Twenty-Third State Legislature  
Regular Session of 2005  
State of Hawaii

Sir:

Your Committee on Water, Land, and Agriculture, to which was referred H.C.R.  
No. 262, H.D. 1, entitled:

"HOUSE CONCURRENT RESOLUTION REQUESTING THE DEPARTMENT OF LAND AND NATURAL  
RESOURCES TO ESTABLISH A TRAINING PROGRAM IN CONJUNCTION WITH THE LOCAL  
REAL ESTATE APPRAISER'S NATIONAL ORGANIZATION AS PART OF THEIR  
PROFESSIONAL EDUCATIONAL SEMINARS TO TRAIN REAL ESTATE APPRAISERS TO USE  
THE INCOME CAPITALIZATION APPROACH TO SET LEASE RENT RATES FOR STATE  
AGRICULTURAL LEASE REOPENING, "

begs leave to report as follows:

The purpose of this measure is to request the Department of Land and Natural Resources (DLNR) to establish a training program in conjunction with the local real estate appraisers' national organization to train real estate appraisers to use the income capitalization approach to set lease rent rates for state agricultural lease reopening.

The Department of Land and Natural Resources submitted testimony in support of this measure.

In many parts of Hawaii, state lands are used for agricultural purposes, and as state agricultural leases are reopened, appraisals of lands are used to determine appropriate lease rents. A common way to appraise agricultural land is by comparing the appraised property with other land sales; however, this method leads to problems, as this approach tends to inflate lease rents.

Your Committee finds that the income capitalization approach is a more accurate application as it appraises the value of the agricultural land based on its agricultural yield; however, there is a shortage of appraisers who are capable of using this approach. Thus, this measure requests the Department of Land and Natural Resources to:

(1) Work with the local real estate appraisers' national organization in establishing a training program to train appraisers, as part of their professional education seminars, to use the income capitalization approach in setting lease rent rates for state agricultural lease reopenings;

(2) Establish a pilot program to implement the income capitalization approach for reopenings of state agricultural leases; and

(3) Report on the progress of the pilot program and any findings and conclusions based on the pilot program to the Legislature no later than twenty days before the convening of the Regular Session of 2007.

As affirmed by the record of votes of the members of your Committee on Water, Land, and Agriculture that is attached to this report, your Committee concurs with the intent and purpose of H.C.R. No. 262, H.D. 1, and recommends its adoption.

Respectfully submitted  
on behalf of the members  
of the Committee on  
Water, Land, and  
Agriculture,

\_\_\_\_\_  
RUSSELL S. KOKUBUN, Chair

STAND. COM.  
REP. NO.  
1434

Honolulu,  
Hawaii

, 2005

RE: H.C.R.  
No. 262

H.D. 1

Honorable Calvin K.Y. Say  
Speaker, House of Representatives  
Twenty-Third State Legislature  
Regular Session of 2005  
State of Hawaii

Sir:

Your Committees on Agriculture and Water, Land, & Ocean Resources, to which was referred H.C.R. No. 262 entitled:

"HOUSE CONCURRENT RESOLUTION REQUESTING THE DEPARTMENT OF LAND AND NATURAL RESOURCES TO ESTABLISH A TRAINING PROGRAM IN CONJUNCTION WITH THE LOCAL REAL ESTATE APPRAISER'S NATIONAL ORGANIZATION AS PART OF THEIR PROFESSIONAL EDUCATIONAL SEMINARS TO TRAIN REAL ESTATE APPRAISERS TO USE THE INCOME CAPITALIZATION APPROACH TO SET LEASE RENT RATES FOR STATE AGRICULTURAL LEASE REOPENING,"

beg leave to report as follows:

The purpose of this concurrent resolution is to stabilize state agricultural lease rents by requesting the Department of Land and

Natural Resources (DLNR) to:

- (1) Establish a training program, in conjunction with the local real estate appraiser's national organization, to train real estate appraisers to use the income capitalization approach to set lease rent rates for state agricultural lease reopening;
- (2) Establish a pilot program implementing the income capitalization approach using the agricultural yield of the leased land to set lease rent rates for state agricultural lease reopening; and
- (3) Report its findings and recommendations to the Legislature, including the lease rent amounts resulting from using this methodology, no later than 20 days prior to the convening of the Regular Session of 2006.

DLNR, Hawaii Farm Bureau Federation, and the Hawaii Association of REALTORS supported this measure.

Your Committees are cognizant of concerns regarding a potential conflict between the use of an income capitalization approach to appraising rental reopening and the provisions of section 171-17(d), Hawaii Revised Statutes. However, your Committees note that DLNR has indicated in the public hearing that the provisions in this measure will not violate current statutory requirements. In addition, it is the intent of your Committees that the income capitalization approach specified in this measure consider the income that can reasonably be derived from the quality of the soil and other production factors of the leased agricultural lands. Income derived from token farming operations or severe underuse of fertile agricultural land should not be used as the basis of the income capitalization approach.

Upon careful consideration, your Committees have amended this measure by:

- (1) Changing the date of DLNR's report from no later than 20 days prior to the Regular Session of 2006 to no later than 20 days prior to the Regular Session of 2007; and
- (2) Making technical, nonsubstantive amendments for style, clarity, and consistency.

As affirmed by the records of votes of the members of your Committees on Agriculture and Water, Land, & Ocean Resources that are attached to this report, your Committees concur with the intent and purpose of H.C.R. No. 262, as amended herein, and recommend that it be referred

to the Committee on Finance in the form attached hereto as H.C.R. No. 262, H.D. 1.

Respectfully  
submitted on  
behalf of  
the members  
of the  
Committees  
on  
Agriculture  
and Water,  
Land, &  
Ocean  
Resources,

\_\_\_\_\_  
EZRA R. KANOHO, Chair

\_\_\_\_\_  
FELIPE P. ABINSAY, JR., Chair

STAND. COM.  
REP. NO.  
1711

Honolulu,  
Hawaii

, 2005

RE: H.C.R.  
No. 262

H.D. 1

Honorable Calvin K.Y. Say  
Speaker, House of Representatives  
Twenty-Third State Legislature  
Regular Session of 2005  
State of Hawaii

Sir:

Your Committee on Finance, to which was referred H.C.R. No. 262, H.D. 1, entitled:

"HOUSE CONCURRENT RESOLUTION REQUESTING THE DEPARTMENT OF LAND AND NATURAL RESOURCES TO ESTABLISH A TRAINING PROGRAM IN CONJUNCTION WITH THE LOCAL REAL ESTATE APPRAISER'S NATIONAL ORGANIZATION AS PART OF THEIR PROFESSIONAL EDUCATIONAL SEMINARS TO TRAIN REAL ESTATE APPRAISERS TO USE THE INCOME CAPITALIZATION APPROACH TO SET LEASE RENT RATES FOR STATE AGRICULTURAL LEASE REOPENING,"

begs leave to report as follows:

The purpose of this concurrent resolution is to request the Department of Land and Natural Resources, along with the local real estate

appraiser's national organization, to establish a training program to instruct real estate appraisers to use the income capitalization approach to set lease rent rates for State agricultural lease reopening.

As affirmed by the record of votes of the members of your Committee on Finance that is attached to this report, your Committee concurs with the intent and purpose of H.C.R. No. 262, H.D. 1, and recommends its adoption.

Respectfully  
submitted on  
behalf of  
the members  
of the  
Committee on  
Finance,

\_\_\_\_\_  
DWIGHT TAKAMINE, Chair

- Item I-1** Request for Approval to Enter Into a Reburial Agreement with 407 Partners, LLC for the Human Skeletal Remains Reinterred on their Property at Kailua Ahupua'a, Ko'olaupoko District, Island of O'ahu at [TMK (1) 4-3-052:27]
- Item I-2** Request for Approval to Enter Into a Reburial Agreement with Castle & Cooke, Inc. for the Human Skeletal Remains Reinterred on their Property at Mokule'ia Ahupua'a, Waialua District, Island of O'ahu at [TMK (1) 6-8-003:001]
- Item I-3** Request for Approval to Enter Into a Reburial Agreement with Lewis Pirkle Conger for the Human Skeletal Remains Reinterred on his Property at Kailua Ahupua'a, Ko'olaupoko District, Island of O'ahu at [TMK (1) 4-3-026:009]
- Item I-4** Request for Approval to Enter Into a Reburial Agreement with A&B Kaka'ako, LLC for the Human Skeletal Remains Reinterred on their Property at Honolulu Ahupua'a, Kona District, Island of O'ahu at [TMK (1) 2-1-048:08]
- Item I-5** Request for Approval to Enter Into a Reburial Agreement with Victoria Johnson for the Human Skeletal Remains Reinterred on her Property at Laie Ahupua'a, Ko'olaupoko District, Island of O'ahu at [TMK (1) 5-5-002:85]

Kaleo Paik representing Historic Preservation (HP) spoke on all five burial agreements describing each background, whether from the repository which all were except Item I-5 and staff recommends approval.

~~Unanimously approved as submitted (Johns, Gon)~~

- Item D-7** Forfeiture of General Lease No. S-4008, Walter and Evelyn Chong Trust, Lessees, Waimanalo, Koolaula, Oahu, TMK: (1) 4-1-027:014.

Morris Atta, Administrator for Land Division, informed the Board on the background. The lessees contend that DLNR did not use the appropriate valuation methodology that they alleged should've been used which is the income capitalization method. The Department's position is the income capitalization method was inappropriate because the lessees are not or have not fully utilized the property for the intended agricultural purposes. Also the legislature included in that directive to the Department that this methodology was inappropriate for token farming. He detailed the property being used for single family use and minimal pastoral and agriculture use. The lessee is here to contest the methodology which had gone to arbitration in accordance to the lease. The lessee also agreed to enter into binding arbitration. The arbitration panel made the decision.



Member Johns wondered if the Board can over ride an arbitration panel and if there is another process the lessee should follow.

Randy Ishikawa, Deputy Attorney General, explained what appeals could be taken to the court.

Chair Thielen clarified staff's recommendation is to cancel the lease for non-payment.

Member Johns queried if this is contestable. Mr. Ishikawa replied if it is a default, it can.

Member Pacheco asked whether the Board has jurisdiction over the arbitration and Member Johns said not at this point.

Walter Chong, lessee, introduced his wife and son and explained his situation. Chair Thielen noted that the Board doesn't have the authority to change the arbitration award and per Sunshine Law can only act on the non-payment of rent. Robert Chong, Walter Chong's son described that the State's appraiser was in conflict. Chair Thielen suggested the lessees see staff and the deputy attorney general on how to appeal the arbitration process.

Member Johns suggested approving this but delay implementation for 2 weeks to clarify whether there are any avenues to appeal arbitration and if not that's the end.

Robert Chong asked if the lessee may file for a contested case for forfeiture. Chairperson Thielen explained how they can file for that and not the arbitration. It has been over a year and she felt he had opportunities to appeal.

There was discussion regarding arbitrators, their decisions and processes.

Mr. Ishikawa said that the Attorney General's office is willing to confer with opposing counsel however they can't advise someone on how to take an appeal. If there is a challenge to the arbitration award or process there are remedies set by statute.

Robert Chong felt this Board has jurisdiction over this lease and could act to vacate that award to have it done correctly. The lease amount was skewed five times more than what his parents were paying. Member Johns was not willing to do that unless the processes were established by law or by contract.

Walter Chong described the difficulties for farmers in increased costs. Robert Chong stated that it cost \$6500 for one day of arbitration which his dad can't afford. Member Johns noted no one forced his dad to sign the lease and he agreed to the process. Robert Chong added which worked the last time.

The lessee was told he may state verbally he wants a contested case before the end of today's meeting and to submit it in writing in 10 days.

Robert Chong requested a contested case.

**The Board:**

Amended staff's recommendation by deferring the effective date of this Board action for 30 days until July 13, 2008 to provide the parties the opportunity to return to the Board with recommendations, if any, for addressing the Lessee's concerns about the arbitration process. Otherwise, the Land Board approved staff's recommendations as submitted. Attorney for Lessees, Robert Chong orally requested a contested case hearing on the Board's decision and was informed by the Chair that he had 10 days to file a written request.

**Unanimously approved as amended (Johns, Schuman)**

**Item C-4 Request Approval of Contract with the Maui Land & Pineapple Company, Inc. to participate in the State Forest Stewardship Program.**

Member Gon recused himself.

Paul Conry for DOFAW gave background and recommended approval.

**Unanimously approved as submitted (Edlao, Pacheco)**

**Item L-8 Application for a DLNR Dam Construction/Alteration Permit (Permit No. 22) Opauala Reservoir No. 1 (HI-018) - Emergency Spillway Tunnel Repairs.**

Denise Manuel representing Engineering Division reported history, background and distributed photos. Staff recommends approval.

**Unanimously approved as submitted (Johns, Gon)**

**Item F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Education Permit to Vincent Collins, National Oceanic and Atmospheric Administration, Papahānaumokuākea Marine National Monument, for Access to State Waters to Conduct International Year of the Reef Teacher-at-Sea Education Activities**

Dan Polhemus, Administrator for Division of Aquatic Resources (DAR), distributed OHA letters, described background, applicant met findings and staff asked for approval. Vincent Collins was here to answer questions.

**Unanimously approved as submitted (Pacheco, Gon)**